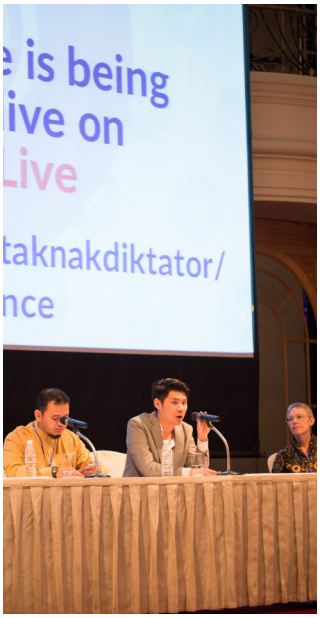
#TAKNAKDIKTATOR CIVIL SOCIETY COALITION

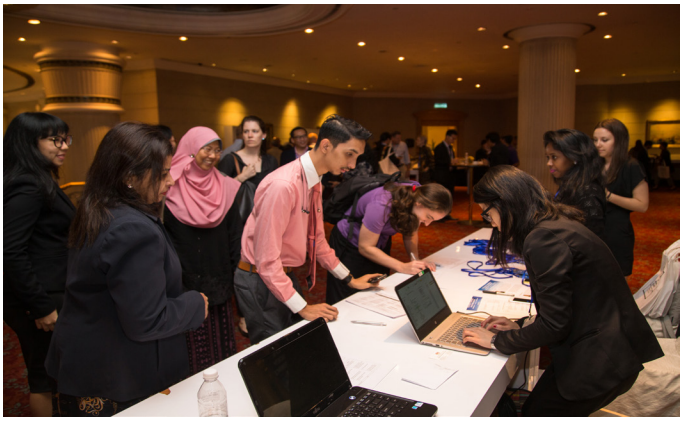
THE CONFERENCE ON THE NATIONAL SECURITY COUNCIL ACT 2016

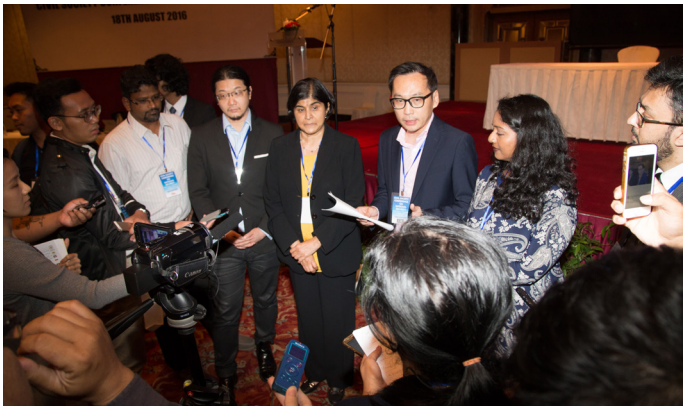
KUALA LUMPUR, MALAYSIA. 18 AUGUST 2016



REPORT ON CIVIL SOCIETY'S CONFERENCE ON NATIONAL SECURITY

KUALA LUMPUR





INTRODUCTION

On 1 December 2015, Minister in the Prime Minister's Department YB Dato' Seri Shahidan Kassim, tabled the National Security Council Bill 2015 in Parliament. The bill was said to replace the emergency ordinances that were repealed together with the Internal Security Act 1969 in 2012 with the primary aim of tackling terrorism and protecting the sovereignty of the country.

The bill was distributed to Members of Parliament only the day before, giving no adequate time for Members of Parliament to study the bill. It was at this point that members of civil society noticed the tabling of the bill and initiated a study and an immediate protest against it.

The bill gives the Prime Minister absolute powers without the necessary checks and balances needed to ensure that these powers are not practiced arbitrarily. It also undermines the values needed in a parliamentary democracy. The bill infringes articles of the Federal Constitution and therefore undermines the rule of law.

Eight civil society organisations came together to oppose the passing of this bill. These eight civil society organisations include Lawyers for Liberty, Amnesty International Malaysia, HAKAM, Institut Rakyat, IKRAM, C4, BERSIH 2.0, and PROHAM. A coalition comprising of these eight civil society organisations was formed to undertake all necessary measures to stop the passing of this bill. A detailed memorandum was written explaining the shortcomings of the bill that will create a dictatorial Prime Minister.

The coalition then came to call itself the #TAKNAKDIKTATOR coalition which essentially means reject dictatorship. A campaign against the bill was launched. A first stage protest was organised on 2 December 2015. Coalition members were present at Parliament to hand Members of Parliament memorandums explaining why the bill should not be passed. Members of the coalition also faced harassment at Parliament although minimal. Coalition members arranged for a meeting with with Dato' Seri Shahidan Kassim on 3 December 2015 but the meeting was not fruitful as the Minister was adamant in defending the bill.

Another protest was staged this time at the Senate on 21 December 2015 and another set of memorandums were handed to Senators. A briefing for Senators was also organised at the House of Senate and all Senators were invited to attend the briefing. Unfortunately, only Senators appointed by opposition parties attended the meeting. Although the Senate voted to pass the bill, members of the Senate had explicitly stated that certain amendments to the bill must be made especially to Sections that infringe the Federal Constitution. But Dato' Seri Shahidan Kassim then announced that the bill is passed at the Senate without any amendments on 22 December 2015.

We continued the campaign against the National Security Council Bill. On 1 August the bill was gazetted. The #TAKNAKDIKTATOR coalition continued the campaign against the Act. The coalition then organised a national conference on the subject matter by inviting experts from different jurisdictions to speak on the subject matter of proportionality, national security measures and terrorism.

The conference was a success with over 200 participants from members of the public, civil society, ambassadors, politicians, academicians and the media.

The #TAKNAKDIKTATOR coalition will also like to record its appreciation to Thulsi Manogaran and Quah Su Enn as conference coordinators for the efficient coordination and organisational efforts. The coalition would also like to thank Thulsi Manogaran for the writing of this report.

Thank you
Lead Organisers
Eric Paulsen (Lawyers for Liberty)
Shamini Darshni (Amnesty International Malaysia)
Yin Shao Loong (Institut Rakyat)

On behalf of
The Steering Committee-
The #TakNakDiktator Campaign Coalition; Amnesty International Malaysia; BERSIH; Centre to Combat Corruption and Cronyism (C4); National Human Rights Society (HAKAM); Pertubuhan Ikram Malaysia (IKRAM); Institut Rakyat; Lawyers for Liberty; Persatuan Promosi Hak Asasi Malaysia (PROHAM); Suara Rakyat Malaysia (SUARAM).

MEMORANDUM TO MEMBERS OF DEWAN NEGARA ON THE NATIONAL SECURITY COUNCIL BILL 2015

15th December 2015

Malaysian civil society organisations view with serious concern the National Security Council Bill 2015 (NSC Bill) that was rushed through Dewan Rakyat on 3rd December 2015.

This Bill has dire consequences for the people of Malaysia and represents an unprecedented threat to what remains of parliamentary democracy in Malaysia.

Why is there a need for such a sweeping piece of legislation especially since it was done in such haste, without any justification, publicity or consultation?

The tabling of this Bill represents an extremely dangerous step for Malaysia as it concentrates extraordinary powers within the hands of a single member of the Executive arm of Government. Mechanisms of check and balance normally found within parliamentary democracies are either absent or severely compromised in Malaysia.

No person or entity should have absolute and unfettered powers. Concentration of power leads to the temptation for abuse, particularly in times of political crisis. The NSC Bill represents a quantum leap towards a dictatorship and a military-police state.

The serious ramifications of this Bill call for further and extensive consideration by the Dewan Negara.

The following are the immediate issues that are apparent-

a) The constitutionality of the NSC Bill in light of Article 150 of the Federal Constitution is highly questionable. Article 150 specifically provides for the DYMM Yang Di- Pertuan Agong to issue a Proclamation of Emergency where there exists a "grave emergency" in the Federation. The provisions of this Bill will create a separate mechanism under which the Prime Minister can effectively proclaim a "security area". The NSC Bill therefore effectively usurps the power of the DYMM Yang Di- Pertuan Agong, which will now be exercised by the Prime Minister even though the word "emergency" is not used in the Bill; [Clause 18]

b) In relation to the military, the chain of command that DYMM Yang Di-Pertuan Agong shall be the Supreme Commander of the armed forces as provided for under Article 41 of the Federal Constitution has been ignored. Further, there has been no regard for Article 137 which provides for the Armed Forces Council, Article 150 for the proclamation of emergency, and the Armed Forces Act 1972;

c) The Prime Minister is given unlimited power to declare an area anywhere in Malaysia a "security area" even though it does not amount to a real threat that justifies the involvement of the military;

d) There are no checks and balances as the role of the other members of the NSC is merely advisory. Parliament has no supervisory powers because under Clause 18(6), a declaration and any renewal is only laid before Parliament (not debated) with no specific time period as to when. Furthermore, the six months limitation on the declaration is an illusion as the Prime Minister may, without any consultation, extend the period of the declaration any number of times; [Clause 18]

e) Malaysia has existing legislation to address national security issues. In addition, the government has brought in controversial legislation such as the Prevention of Terrorism Act 2015 (POTA), the Security Offences (Special Measures) Act 2012 (SOSMA), the Prevention of Crime Act 1959 (with substantial amendments in 2014) and the 2012 amendments to the Penal Code that added numerous vague offences against the state including "activities detrimental to parliamentary democracy";

f) The entire legislation is open ended and vague in many of its key definitions, and tremendous scope is given to the NSC to determine what constitutes a security issue. Of particular concern is Clause 18(1) of the NSC Bill and the low and arbitrary threshold for the Prime Minister to declare a "security area". Some of these phrases include "seriously disturbed or threatened by any person", "likely to cause serious harm," "to the territories, economy, national key infrastructure of

Malaysia or any other interest" and "interest of national security"; [Clauses 4 and 18]

g) A declaration of a "security area" allows authorities arbitrary powers of use of violence and deadly force, warrantless arrest, search and seizure, and imposition of curfews. It also empowers them to take possession of land, buildings and moveable property, and to destroy any unoccupied building or structure within a security area; [Clauses 25, 26, 27, 28, 29, 30, 31, 33, 34 and 42]

h) There will be impunity as the NSC Bill allows dispensation with inquests of members of security forces and persons killed within the security area as long as the magistrate is satisfied that the person has been killed in the security area as a result of operations undertaken by the security forces; [Clause 35]

i) The Bill allows the NSC to compel Government Entities to report to it, and to furnish information to it. This would allow the NSC to override a State Government's authority; [Clause 17]

j) The Bill allows the NSC to act as a super intelligence gathering entity as it compels the military, police and other agencies to provide their independently gathered intelligence; [Clause 17]

k) Protection for members of the NSC, its committees, personnel and security forces from any civil and criminal proceedings (unless done in bad faith) coupled with the obligation of secrecy under the Bill, renders them completely unaccountable for their actions. [Clauses 37, 38, 39, 40 and 41].

Assurances that the legislation will not be abused give little comfort. This is because the authorities have used the harsh pre-trial detention powers provided under SOSMA despite similar assurances. For example, Khairuddin Abu Hassan and his lawyer Matthias Chang were detained and charged for "attempted sabotage" and tried under SOSMA.

The NSC Bill is clearly unconstitutional and a grave abuse of power. Malaysia does not need such a Bill as this is nothing more than an attempt by the Prime Minister to usurp more power and centralise that power in him. This goes against all principles of democracy and undermines the rule of law in the country. It will change Malaysia forever.

We, the undersigned civil society organisations therefore call upon all members of Dewan Negara to do their duty by the rakyat, DYMM Yang Di-Pertuan Agong and the Federal Constitution and oppose the NSC Bill.

Signed-

The #TAKNAKDIKTATOR Campaign Coalition

1. Amnesty International Malaysia

2. BERSIH

3. Centre to Combat Corruption and Cronyism (C4)

4. National Human Rights Society
(HAKAM)

5. Pertubuhan Ikram Malaysia
(IKRAM)

6. Institut Rakyat

7. Lawyers for Liberty

8. Persatuan Promosi Hak Asasi Malaysia
(PROHAM)

9. Suara Rakyat Malaysia
(SUARAM)

Welcome Speech

If, and when, the NSC Act is used, we stand the risk of seeing Malaysia sink its human rights record further south.

Ms Shamini Darshni
Executive Director, Amnesty International Malaysia on behalf of the Organising Committee

In recent months, the challenges to national security seem to have escalated not only in Malaysia, but within the South-east Asian region. In response to these challenges, Malaysia and its neighbours have, or are taking, tougher measures which either border on, or out-rightly challenge, basic human rights principles. These tougher measures, in turn, create a separate set of problems not only for those facing allegations of terrorist acts, but for society as a whole.

Almost three weeks ago on 1 August 2015 and despite strong objections from many quarters - Malaysia's own National Security Council Act came into force. The NSC Act stands in the arsenal of laws that the Najib government has at its disposal; laws which threaten the most basic of human rights – the right to life, liberty and security of person, the right to property, and the right to an effective remedy for acts violating fundamental rights.

With the introduction of the NSC Act, the government is spurning checks and balances, and has assumed potentially abusive powers by empowering the Malaysian authorities to trample over human rights and act with impunity. Among our concerns, is that the new law will grant the Malaysian authorities the power to carry out warrantless arrests, search and seize property, and impose curfews at will. One provision, Section 18, allows the Prime Minister to arbitrarily designate any area in the country a "security area," if he deems it a potential source of "harm."

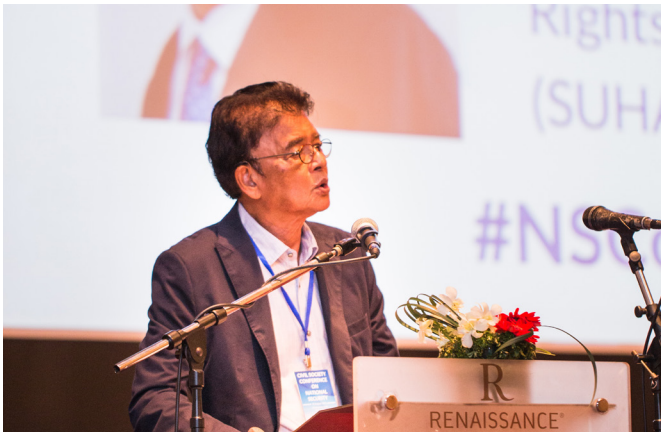
Amnesty International believes that that there is good reason to fear that the Act will be yet another tool in the hands of the government to crack down on peaceful protests under the guise of national security. At the same time, the special status given to "security areas" could worsen Malaysia's track record of custodial deaths and police brutality. The National Security Council Act also allows security forces to use lethal force without internationally recognised safeguards, and grants them broad powers to carry out warrantless arrests.

If, and when, the NSC Act is used, we stand the risk of seeing Malaysia sink its human rights record further south.

And this is why we are here today – to take a deeper look at the NSC Act and to hear from experts from within and outside Malaysia on issues surrounding national security – the actual versus perceived threats, international examples of national security challenges, and to work out how Malaysia needs to move forward in an increasingly repressive environment.

Finally, allow me to put on record my deepest thanks and appreciation to Eric Paulsen and Lawyers For Liberty – with whom it has been a pleasure working with to put things together on this conference; and to recognise our other partners including HAKAM and Suaram. A note of thanks to our conference organisers Thulsi and Su Enn for a bang up job; and to our interns and volunteers helping us run things today. I hope we have a day of meaningful, productive conversation.
Thank you.

Keynote Speech



Tan Sri Razali Ismail
Chairman, National Human Rights Commission of Malaysia (SUHAKAM)

The threat and reality of terrorism has grown exponentially and countries throughout the world have been struggling to develop effective responses to ensure their national security is protected. Such violent lethal activities have propelled nations to beef up their security and anti-terror laws. Malaysia too has followed suit, recognising that the rampant terrorism threatens the peace and harmony of the nation encapsulated in our constitution.

However in the process of effecting the nation's response, the question that must be posed, whether those sweeping actions are in proportional response to the threat posed, or more would think in the process undermine underlying harmony and ethos as encapsulated in our constitution, affecting our individual and social liberties and freedom.

A significant proportion of Malaysians while accepting the need to be vigilant and defend our national security are questioning the enactment in recent years of various security laws such as The Security Offences (Special Measures) Act 2012 (SOSMA), Prevention of Terrorism Act 2015 (POTA), and the National Security Council Act 2016 (NSC), amongst others. These security laws are among the critical issues of concern for Suhakam in light of its implications on human rights.

The National Security Council Bill 2015 went through the two Houses of Parliament and was gazetted into law on 7 June 2016 and came into force on 1 August 2016 by virtue of Article 66(4A) of the Federal Constitution without royal assent.

The National Security Council Act 2016, among others, allows the imposition of emergency-like conditions in security areas declared by a National Security Council led by the prime minister.

The exercise of maintaining stability, protecting the interest and security of the nation must be in tandem in promoting civil liberties and human rights. As a cardinal rule, it is the responsibility of the state as the guarantor of human rights, to ensure that peace is maintained and the rights of individuals are respected and protected even as the state needs to be vigilant to protect country and people from all manner of threats.

Granted this is easier said than done. There have been examples in the world where threats external or internal have resulted in the suppression of groups whose ideas are not in consonant with the state. Emergency areas, Military Operation Areas in those countries have trammelled rights in the name of security.

As a cardinal rule, it is the responsibility of the state as the guarantor of human rights, to ensure that peace is maintained and the rights of individuals are respected and protected even as the state needs to be vigilant to protect country and people from all manner of threats

Closer to home, the internal conflict in Nanggroe Aceh Darussalam, Indonesia (as an example), following a presidential decree declaring a 'military emergency' in the area and the imposition of martial law, led to the loss of thousands of lives, destruction of properties and suspension of fundamental rights.

In the said conflict, which has been well documented by human rights groups such as Amnesty International and Human Rights Watch, the imposition of martial law resulted in gross violations of human rights, such as unlawful killings, enforced disappearance, rape and torture.

The extreme example above does not apply to Malaysia and hopefully never will but against this backdrop and examining the substance of the NSC, the apprehensions of many Malaysians against the said Act are not unfounded as we all know that national security has long been one of the preferred tools by which many governments, even democratic ones, resort to controlling the free flow of information and ideas.

Without clear definitions or safeguards

Many provisions of the NSC are couched in fairly general terms without clear definitions or safeguards. Further, the unclear definition of security in the NSC may also be interpreted to suppress expression of thoughts, opinions or beliefs on public matters, including government policies.

Whilst certain rights may be limited to protect certain enumerated aims/purposes such as national security, public order, public health and morals and the rights and freedoms of others, those aims/purposes are not to be interpreted loosely. Of particular concern is that such unfettered powers granted under the NSC without proper checks and balances may threaten the state of human rights in the country.

Whilst recognising the need for security, Suhakam feels that the three branches of government, i.e. the executive, judiciary and legislature must play its respective roles as to complement each other to ensure that proper safeguards are in place to strike a balance between security and the liberties and freedoms guaranteed under the Federal Constitution of Malaysia.

Any denial of those liberties and freedoms must be proportionate, reasonable and in line with Malaysia's obligations under the various international human rights treaties of which Malaysia is a party to.

There has been much debate over the declaration of a 'security area' under the NSC, in light of the absolute power given to the head of government to declare an area as a security area for a period of six months. Not only does the head of government have the power to declare a security area, he is also the chairperson of the NSC Council which in fact advices the latter on the declaration of a security area.

In addition, the head of government can renew the declaration for a further six months. Notwithstanding the consent of both Houses of Parliament to annul the declaration, this renewal can be done continuously without any limit. This implies that the NSC essentially gives unlimited power to the Head of Government, which raises concerns of accountability and impartiality on the part of the Executive.

It is imperative that the Judiciary and Legislature assert its roles as checks upon the Executive. Is there any way that suitable provisions can be added into the Act to manifest this serious concern by Malaysians?

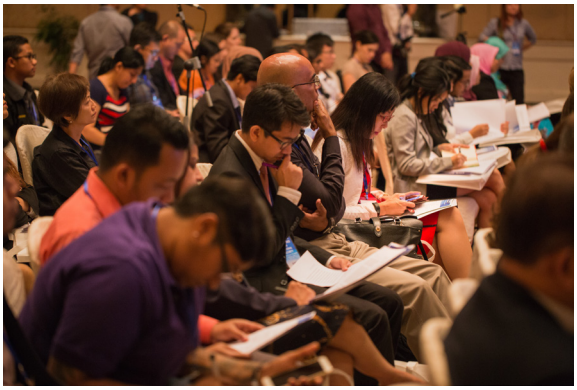
No mechanism to review any direction

As there is no mechanism to review any direction or order made vide the provisions of the NSC, Suhakam advocates for the creation of a mechanism of review as has been emphasised in the report of the United Nation's Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. The said report suggested that the review of security and anti-terrorism laws should include:

a) Annual governmental review of and reporting on the exercise of powers under counter-terrorism laws;
b) Annual independent review of the overall operations of counter terrorism laws; and
c) Periodic Parliamentary review.

The provisions of the NSC has various implications on human rights. For example, NSC is important in order to ensure that the goal it was enacted for is clear and does not diminish the spirit of our constitution.

The preamble in its current form is unclear and thus, may lead to an abuse of power as its following that, the provision of the NSC provide powers to, amongst others, impose curfews, restrict movement, conduct warrantless searches, and take temporary possession of land or movable property.



Whilst the security forces may require such powers during an emergency to protect the security of the nation, nonetheless, the Legislature must ensure that such powers do not encroach upon the individual's and societies' liberty.

Here, Malaysia has an obligation as a member of the United Nations to observe that pursuant to Article 9 of the Universal Declaration of Human Rights ('UDHR'), no one shall be subjected to arbitrary arrest, detention or exile.

While Malaysia is not a party to the International Covenant on Civil and Political Rights (ICCPR), it is nevertheless bound by customary international law, including the Universal Declaration of Human Rights, and cannot comprehensively justify this broadly worded law as required for a state of emergency.

Suhakam urges the Legislature to play its role to proactively review the NSC with human rights in mind to ensure that relevant safeguards be inserted into the provisions of the NSC.

Judiciary should ensure checks and balances

The Judiciary is in the best position to ensure there are proper checks and balances on the use of any legislation enacted by the Legislature. As mentioned in the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, any decisions which limit human rights must be overseen by the Judiciary, so that they remain lawful, proportionate and effective, in order to ensure that the government is ultimately held responsible and accountable.

Suhakam regrets that the Judiciary's role has not been specifically mentioned within the provisions of the NSC. For example, there is no mention of whether individuals affected by the operations in a security area have the right to seek judicial review for effective remedies against abuse to ensure that their rights are effectively safeguarded.

Suhakam is also aware that section 38 of the NSC provides for a blanket immunity against any action, suit, prosecution or any other proceedings brought, instituted or maintained in court against the Council, any committee, any member of the Council or committee, the Director of Operations, or any member of the security forces or personnel of other government entities in respect of any act, neglect or default done or omitted in good faith.

Such immunity undermines the role of the judiciary to afford affected individuals or groups the right to judicial review to ensure the due process is observed in the implementation of directions and orders under the NSC.

Suhakam asks whether the government have considered examples from other countries' security provisions, which manifest a better balance and a sense of proportionality. We need to ensure that the three branches of the government complement each other to ensure a balance between national security and human rights.

At this juncture, Suhakam has been grateful for certain agencies of the government that have opened up relevant discussions with us. Suhakam would like to express its willingness to advise the NSC Council on matters of human rights and national security and the commission is open to any invitation to sit in the NSC Council's meetings pursuant to section 10 of NSC, or alternatively a committee created pursuant to Section 12 of the said Act.

Our proposal is in line with the mandate and functions as contained in Suhakam's founding Act. Whatever are the exigencies and compulsions under whatever circumstances, this country must honour and preserve our liberties and our democratic freedom.

Benjamin Franklin had said in 1755 that: "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety".

This simple phrase reminds us that the philosophy espoused by both rights and security advocates has been played throughout the centuries countless times. Actors be it from the Executive, Legislative and certainly the participants of this conference must play their part to ensure that the balance does not tilt heavily towards the other end, thus ensuring the relationship between national security and human rights is always in tandem and in balance.

This is an important part of the Malaysian ethos.

History of Malaysia's Security Framework and Apparatus

Mr Nicholas Chan
Founding Member and Research Associate, IMAN Research.

This topic can be addressed by answering two research questions from the point of political science and history. Malaysia's security framework is divided into three different eras namely Communism, Communalism and Counter-Terrorism.

The first question is: With Malaysia's emergence as a sovereign state taking place amidst insurgency and regional conflict, followed by domestic political and social upheaval, what is the relevant historical background to Malaysia's security framework and apparatus?

The second question is: How does the NSC and Malaysia's security framework and apparatus measure up to comparable institutions, particularly in states facing clear and present security threats?

A central argument to summarise the relevant findings that can be put forward is, Malaysia is inherently a strong state. Many may argue otherwise, but the fact that the government can impose rules and maintain control over a large territory, proves that Malaysia is a very strong state.

And that is precisely why the NSC Act is now a concern. Because the government is capable of imposing control if they want to. This is why the government can maintain a total approach which is argued by Humphreys in the security framework.[1] This is a total approach to security which attempts to undermine and/or eliminate threats through a combination of coercion and consent, force and ideology.

So what is actually meant by the total approach? Basically, it means to impose security. The government does not only use personnel with guns like the police and the army. It uses a lot of bureaucratic elements within the government, it also uses religious influence, and all realms of policy-making including educational policies, foreign policies and so on.

There are 2 major modes of security apparatus in Malaysia. The first is coercive which basically includes law enforcers, judges, and the executive. And the second is ideological, like the religious bureaucracies for instance, Biro Tatanegara. That is how a totalised approached is developed.

What is very peculiar to Malaysia is there is a very strong ethnoreligious overtone that presides over security policies and considerations. This is considering the fragmented nature of Malaysian politics, where ethnopolitics is quite prevalent today, and there is a one sided dilemma of Malaysia's security framework as argued by Magcamit.[2]

> I would argue that starting from early 80s, increasing Islamisation where the State dictates what is right and wrong in Islam and the State using security framework to deal with people perceived to be on the wrong side has unfortunately caused securitisation of Islam

The most definitive period of our security framework and apparatus was the communist insurgency period. In 1948, when the State was facing existential threats i.e. the communists, the west Malaysian states then came together as a counter reaction. That is why we have a centralised police force and policy making. The police became a major instrument for regime preservation. The police fought the war in the form of an emergency. More policemen died fighting the communist than the army ever did.

1. Humphreys, Andrew, A total approach: the Malaysian security model and political development, Doctor of Philosophy thesis, School of History and Politics,University of Wollongong, 2009.

2. Michael Magcamit, 'A Costly Affirmation: Exploring Malaysia's One- Sided Domestic Security Dilemma', Asian Affairs: An American Review, Vol.42, No.1, 2015, pp.22-45.

And due to the fact that membership of communist insurgents were mainly Chinese, a propaganda war was waged to win the hearts and minds of the people, and this was when an ethnic dimension was fused into Malaysia's security outlook.

Then came Communalism. The exit of PAS from BN followed by a wave of Islamist revivalist politics forced the government to revamp its security policies and maintained an obsession towards Muslim unity. Muslim unity and national security was placed on equal position. But there was also a contest of Muslim unity which led into a fight over who defines the right and wrong type of Islam and this leaked into the security domain as seen in the crackdown on many purportedly 'deviant' groups.

Around the time of communalism, the government called many militants 'deviants' because 'terrorists' is heavily ethnicized. Malaysia then positioned itself as a key anti-terror Muslim ally. Before this the definition of a terrorist could only be found in the ISA, which is now repealed. Hence the massive expansion of legal and penal codes definition to stem activities related to terror today. So the state is heavily defining what it means to be a terrorist.

Simultaneously, curtailing civil liberties is a valid concern. The passing of laws such as the NSC Act, as well as various other amendments made in the past 3 years to the Penal Code and the Sedition Act creates tremendous concerns amongst the people. So what is practiced by the current administration is a hardening of ways with militants. They were seen as deviants in the past, thus detained under the ISA then released back into society. But now they get charged in court, and punished heavily. These cases are also given substantial coverage.

State of the Nation Today

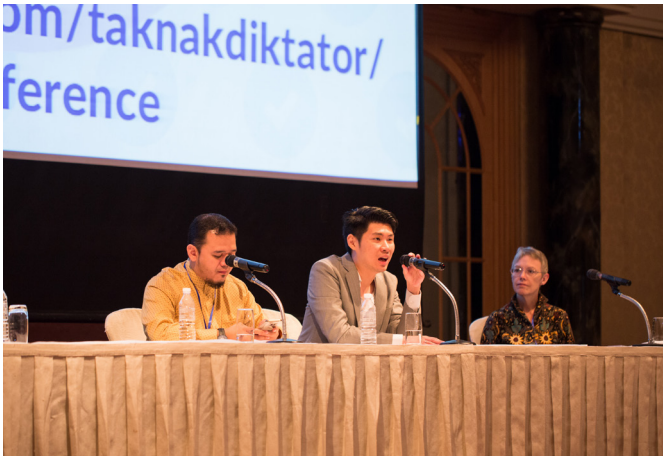
We are seeing the state coming to terms with a larger unpoliced terrain, a situation created by the digital boom. This comes after many being radicalised online. It is more difficult to control dissent when the larger unpoliced terrain is online. Since it is harder to control these terrains, many laws are passed as an apparent solution.

I would argue that starting from early 80s, increasing Islamisation where the State dictates what is right and wrong in Islam and the State using security framework to deal with people perceived to be on the wrong side has unfortunately caused securitisation of Islam.

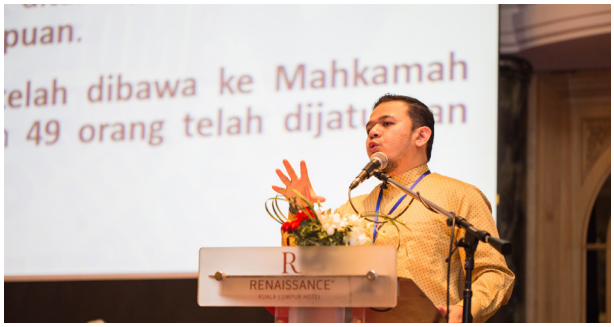
History strongly dictates that the security apparatuses in Malaysia were defined by the communist insurgency, that is why until today we only have about 9% of the police in the criminal investigative department but we have about 30% still in the public order and internal security department. Malaysia has a complex scenario due to the position of Islam, but it is not unique in South East Asia.

A more comparative overview, can be derived from a comparison with Singapore and Indonesia. Singapore tries to maintain a strong secular façade that is why it is galvanising citizens in this security framework. They are very afraid if there is an attack there would be discourse on religion. Indonesia, especially after Suharto, has developed a more decentralised framework. That is why in terms of counter terrorism, Indonesia cannot be as strong or intimidating as Malaysia or Singapore.

In conclusion, national and regime security is almost interlinked in Malaysia's security framework. Unfortunately, adopting a total approach entrenched the discourse of race & religion in the security domain, which contradicts efforts to sanitise Islam from terrorism.



Malaysia's present National Security Concerns and Threats



Datuk Dr. Fathul Bari
Member of the POTA Board

The topic given to me is related to the Prevention of Terrorism Act 2015 [POTA]. POTA relates to the prevention of any acts of terrorism or support towards terrorism that involves listed terrorist organisations in a foreign country or in any parts of any country.

Generally, we understand that POTA was intended to control and prevent individuals and/or organisations from being involved in terror activities. But POTA must be read together with other laws like Article 149 of the Federal Constitution, the Penal Code, Security Offences (Special Measures) Act 2012 [SOSMA], Anti Money-Laundering Act 2001 and so on.

Cases that fall under POTA are terror crimes for example the recent Puchong attack. Those responsible for the attack will be arrested under SOSMA and upon investigation by the police, the investigation papers will be surrendered to the Attorney General for further action. The Attorney General will then decide whether to charge these individuals under the Penal Code or the Anti-Money Laundering Act or POTA. That is why, if we analyse closely, only 11 individuals were charged under POTA. 10 of them male and 1 female. This is mainly because these cases were not strong enough to be charged under the Penal Code. For example, these people were arrested for providing support to those in the international list of terrorists such as Abu Sayyaf or Juraini or those in Mindanao.

The other reason would be due to their involvement in groups online either on Whatsapp or Telegram. These groups were formed to provide allegiance to bigger groups is Syria and Iraq. Not many are arrested under POTA. Some of them were arrested at the border in Turkey crossing into Syria. They were crossing the border with an intention of joining ISIS as suicide bombers.

The 11 individuals arrested do not posses in depth knowledge in Islam. However, their spirit to fight for a cause like forming an Islamic state and jihad is commendable. Their aims or targets include announcing that ISIS has reached Malaysian shores. This is done by raising ISIS flags.

It is also important to understand that the recruitment methods are different in ISIS compared to al-Qaeda. Al-Qaeda has a structured format. They have systematic recruitment modules. But ISIS is different. ISIS capitalises on hatred and adapts the guerrilla ideology. ISIS teaches one to hate the system, the governance, the leaders and the law and encourages jihad.

ISIS encourages recruits to follow its leader Abu Bakar al-Baghdadi. Before him it was, Abu Omar al-Baghdadi. He started recruitment through social media and radio channels using the Iraq war as a propaganda. Then, social media gradually became a major recruitment platform to disseminate the ISIS ideology. The question as to how the State can control social media is indeed a complex one. How does the State control Facebook and Twitter and blogs?

If today, a complaint is lodged with the Communications & Multimedia Commission to block these pages and websites; tomorrow, more will mushroom. It is not practical. The State cannot afford to monitor these websites and Facebook pages on a daily basis. In particular, for Facebook, the process takes time. The report has to go to its headquarters and then action is taken. This is the reason why the State cannot afford to have tolerance. When human rights is discussed and freedom of expression and association is of concern, it cannot be more important than national security.

The other concern is keeping them in prison may not be the best idea. Based on experience, prison is a conducive place for these individuals to continue spreading these false ideologies. There was a case where a terrorist was imprisoned for 11 years but his sentence was reduced to 2 years on good behaviour. His two years sentence served him well in building connections and network in prison and spreading his ideologies. This is where it is important to have trained rehabilition prison officers.

National Security and Cross Border Terrorism in Asean

Ms Sidney Jones
Director, Institute for Policy Analysis of Conflict, Jakarta (Indonesia)

It is a must to admit that threats are rising but the capacity of each threat is still quite low. That is the position today as far as Malaysia is concerned.

There is an encouragement of ISIS attacks abroad. At this point, the statement announced during Ramadhan, saying Ramadhan is a month of calamity for all non believers is in itself tremendous encouragement.

> I would underscore one of the biggest problems in fighting terrorism is actually corruption.

And among other things, there was a failed suicide bombing attempt in Indonesia and not a very expert attempt in Malaysia. New ISIS structures are also being set up, not only in Malaysia, but in at least a dozen other organisations in Indonesia, although not necessarily working together.

Another example can very well be the establishment of a province of ISIS in Basilan, Mindanao. We have more examples of plots that have been directed from Syria towards Malaysia and Indonesia, some by the men Fathul Bari mentioned and also by others. And we are seeing more and more Indonesians and Malaysians dying in Syria and Iraq, and that unfortunately, increases motivation for retaliatory attacks.

We are seeing a revival of more dormant networks in a very interesting way as a direct result of the activity in Syria and Iraq. One example is the KMM which was active in Malaysia up to 2001 and whose members were affiliated with Jemaah Islamiah. The other factor is the increasing role that women play particularly when Southeast Asians go to Syria and Iraq as family units. Women play a variety of significant roles to the point that we have to face possibility that women will act as operatives in South East Asia.

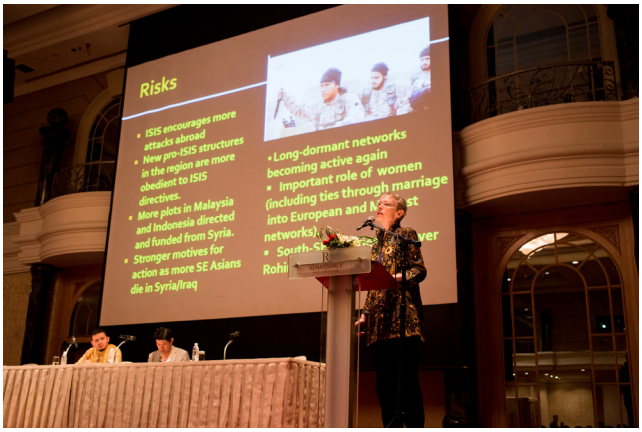
In addition, marriage networks have begun to emerge in Syria and Iraq. One daughter of Abu Janda in Indonesia was married to a foreign fighter. Also there is a need to be overt to the possibility that ISIS will bring with it ties between South Asia and South East Asia particularly through Bangladesh because of the Rohingya issue.

As a reality check, these problems will not vanish as yet or it is not something that will be solved with the eventual collapse of ISIS. These problems cannot be viewed in that manner. Of course in terms of numbers, we still deal with numbers that are much lower than Europe or Australia. And the problem is a lot more complex because it involves the family units and it involves women and children.

It is imperative to keep track of the number of people from Indonesia and Malaysia killed in Syria & Iraq. Much of that information comes out of social media. When you get men killed who have wives in Syria, often those widows rise in social status and become desirable to be married by “mujahedeen”. Again, knowing who the widows remarry is increasingly important.

There is an emergence of at least four Indonesians in leadership roles, competing against one another. The leader that is capable of inciting violence in South East Asia is likely to get more credit with ISIS leadership in Syria and Iraq. One example is Bahrun Naim a social media king, who encouraged lone wolf attacks in Malaysia, Singapore and Indonesia.

In June 2016, a video emerged showing a Malaysian, an Indonesian and a Filipino executing men in Syria. Particularly interesting is those three men also declared allegiance to Isnilon Hapilon, an Abu Sayyaf leader in Basilan. That's the first time a declaration to a leader in the Philippines was made. But these three men and their ties are important for analysis. They all have cross border history. The key leader from Malaysia is a Kumpulan Mujahidin Malaysia (KMM) leader arrested in 2003 and detained under ISA until 2006. Abu Wali, the Indonesian, was arrested in 2004 and detained in the Philippines until 2013. One of them who was detained in Kamunting from 2003 to 2005 was then extradited to the Philippines and Indonesia and was in the same prison cell with Faiz. What we are seeing are links established more than a decade ago in prisons in Malaysia, Philippines and Indonesia, actually coming back to create new bonds in Syria and Iraq. It is important to understand how and where those ties were made.



What are the implications if an ISIS "wilayat" (territory) is declared in Basilan? I think we could see an increased willingness to take orders from the ISIS leadership in Syria and we could also see more training centres being set up.

There are four Malaysians that we know of in Basilan, and it is unclear how many Indonesians, and what is obvious is more fighters are being sent to Basilan from Indonesia and Malaysia and it is also true that individuals are being sent from Syria to train South East Asians in Basilan. Interestingly in April this year, one of the persons killed in a clash with Filipino forces was a Moroccan. How did a Moroccan get to Basilan if he was not actually sent there by ISIS? And we could see the possibility of plots being hatched in Basilan to be implemented or brought back to Indonesia and Malaysia. So the risk is already there.

It is absolutely critical to focus on prisons. I would underscore one of the biggest problems in fighting terrorism is actually corruption. As long as a state does not deal with corruption particularly in prison, that state will face problems like people buying fake documents, crossing borders, getting access that they should not have to individuals in prison, and people communicating inside prison with cellphones because of bribery.

We also need to understand the migrant worker networks even though 99%, if not more who are working overseas from South East Asia are good people only trying to get more money to their families, but it is necessary to filter for radicals and that now includes women radical cells of domestic workers in Hong Kong, Korea, Indonesia that go directly to Syria.

Also while the talk is mostly about threats coming from ISIS, simultaneously, Jemaah Islamiyah and some of its old friends are sending people to Nusra in Syria for 3 month training of the kind that they used to get in Afghanistan. So Jemaah Islamiyah should not be written off completely even though it is anti-ISIS and some of its propaganda is actually being used in counter terrorism programs in the region. But the difference between ISIS and Jemaah Islamiyah at least in Indonesia is that JI had a 25-year time frame, they think along that term.

The bottom line is that the threat is real. The question is how to craft a response that is proportionate to the nature of the threat and I think in this regard, it is a must to look at the statement that the ICRC drafted in June which does a very good job of laying out the need for proportionality so that you don't create more radicals by virtue of the counter terrorism response.

National Security Council Act 2016

The military should be engaged to deal with real threats. Threats as defined in Art 150 which must be imminent and has a higher threshold that affects the sovereignty of the nation.

Mr Mohd Daud Sulaiman

The underlying concern is the military terms used in the Act. It connotes the use of military principles in the realm of civil enforcement and that is, in my view, dangerous. Military principles are different from the police or other enforcement authorities.

There have been subtle connotations from the executive to the people about the King not having any command. Perhaps the drafting hand behind the NSC Act was inspired by the principles set in the United Kingdom. Unfortunately they fail to realise that in the United Kingdom, Parliament is supreme but in Malaysia the Constitution is supreme. And the Constitution says that the King is to have command of the military.

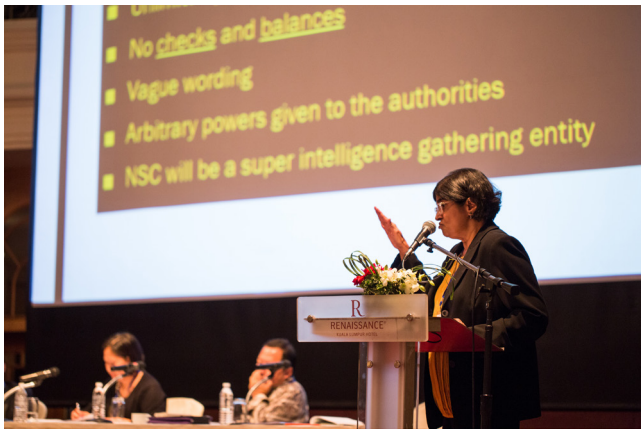
Article 141 of the Constitution says that the King is the Supreme Commander of the Armed Forces. Article 43 states that the King has a discretion to decide on certain matters. In the armed forces, command is sacred and command in the Malaysian context has always come from the King. That is how the military views the chain of command and obeys it. On command, a soldier is willing to give up his life for the country. Therefore, when the chain of command is not in accordance to the Constitution, tremendous confusion is created among the military.

It is also a contempt to the monarch if command is taken away. Everybody knows the issuing directive to start a war is from the King, because the Constitution states so. The three branches of the Government are answerable to the King.

Within the security framework of Malaysia, the military is not trained to understand the Criminal Procedure Code and therefore should not be deployed as enforcing authorities. The military should be engaged to deal with real threats, threats as defined in Art 150 which must be imminent and have a higher threshold that affect the sovereignty of the nation.

The question is not so much if we are against the establishment, but rather why can't we make good laws? Can a declaration of a security area under Section 18 be legal? Will Section 18 be invoked in light of real and imminent danger to the sovereignty of the country or will it be invoked due to perceived threats?

Human Rights, Democracy and the National Security Council Act 2016



Dato' Ambiga Sreenevasan
Spokesperson for Civil Society Coalition

The NSC Act came into force on 1 August 2016. It was rushed through Parliament. The Act effectively gives power to the Prime Minister to declare a security area in any region of the country. The opposition Members of Parliament received the bill 48 hours before it was presented in Parliament.

The #TAKNAKDIKTATOR team attempted hard to reason with lawmakers including ministers to allow for more discussion. But it was flatly refused. Many Members of Parliament had not even seen or read the Bill when it was introduced in Parliament. These lawmakers were not aware of the consequences of the provisions in the Bill. These lawmakers had no idea what their vote to pass the Bill means in actual sense.

Section 18 is the key provision in the National Security Council Act. Section 18 reads, "when the council advises the Prime Minister" referring to a council which performs an advisory function and is meant to advice the Prime Minister. But if one analyses Section 18 deeper, we will be able to see how the Prime Minister can make most decisions on his own without check and balance from the council. The other more worrying aspect of Section 18 is the vague and open ended definition. Section 18 reads, "security in any area in Malaysia is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure or any other interest of Malaysia". How will these words in Section 18 be interpreted and how will it be applied?

Legislations like this have been abused many times in the past. Open ended and vague definitions increases paranoia amongst civil activists and lawyers as the tendency for abuse is high. The key factor in the Act is that the Prime Minister is able to make decisions arbitrarily.

One of the main objections to the NSC Act is also that it contravenes the Federal Constitution. Under the Federal Constitution, the powers to proclaim emergency vests in the King. The effects of declaring a security area provided for under the NSC Act is the same as proclaiming emergency under the Federal Constitution. Basically, a proclamation of emergency as defined in the Federal Constitution is termed as a declaration of security area in the Act. Essentially, it is the same. It is an act of calling it a different term to give an impression that it is not ultra vires the constitution.

#TAKNAKDIKTATOR also made efforts to approach the Conference of Rulers. We explained to Their Highnesses the flaws in the Bill. Despite the rulers' call for refinement thereafter, no changes were made. And here is the worrying aspect, we do not know what was the refinement sought, what did the Conference of Rulers take into account. Parliamentarians should have been briefed about the concern of the Rulers.

The NSC Act was gazetted without receiving royal assent and that is also unprecedented. This is a cause for concern because in essence it means the King did not agree with the Bill presented to His Majesty. There is a provision under the Federal Constitution where after 30 days of failure of assent by His Majesty, the Bill goes into effect nevertheless. But the question remains, why was royal assent not given? Obviously the rulers took an interest because the Act infringes Article 150 of the Federal Constitution and the powers of the King to make a proclamation of emergency.

The other main objection to the NSC Act is that the Act usurps the powers of the King. The NSC Act gives the exercise of power to the Prime Minister, even in the midst of emergency. However, the Federal Constitution has stipulated explicitly that certain powers and certain discretions are vested in the King. One such clear example is a proclamation of emergency under Article 150. And this is a form of check and balance. That check and balance is completely removed when the Prime Minister vests in himself absolute power to declare a security area under the NSC Act when the effects are the same as a proclamation of emergency under the Constitution.

In comparison to the ISA, which was repealed several years ago, where the power to proclaim an emergency vests in the King. The ISA states that if in the opinion of the King, the public security in any area is threatened then the King may declare or make a proclamation of emergency. That was stated in Section 47 of the ISA and is in accordance with Article 150 of the Federal Constitution.

In the NSC Act, the declaration of security is to be declared by the Prime Minister. The NSC Act uses the words 'seriously disturbed or threatened, serious harm to the people etc or any other interest of Malaysia' whereas under the repealed ISA, the words are 'serious threat by a substantial body of persons to a substantial number of citizens to fear organised violence'. In other words, the government has revived the Internal Security Act and made it worse.

The Act is certainly a huge threat to parliamentary democracy because it allows the concentration of extraordinary powers within the hands of a single member of the Executive. The mechanisms of check and balances normally found within parliamentary democracies are absent in the Act and the NSC Act represents a quantum leap towards a dictatorship and a military-police state.

Section 18(2) of the Act states that a declaration shall cease to have effect upon the period specified but goes on to explain that, "Notwithstanding that, the declaration may be renewed by the Prime Minister from time to time, as may be specified in the declaration". The Act seems to have on the surface safeguards but those safeguards are rendered redundant by additional enabling provisions extending the powers of the Prime Minister. The Prime Minister can go on extending the declaration as long as he sees fit. He does not have to consult the council.

Section 18(6) of the Act says, "a declaration shall be published in the Gazette and laid before Parliament as soon as possible". How can the government claim that there is oversight by Parliament if it is merely laid before Parliament and not debated?

Section 17 compels government entities to report to the government and furnish information and it allows the NSC to override a State Government's authority. In other words, it becomes a super intelligence gathering entity. The council can compel military, police and other agencies to provide independently gathered intelligence. And the consequences of the other provisions in the Act are equally damning. Section 35, for example, that provides for the exclusion of inquests into deaths of officials or any other person. One obvious observation from the provisions in the Act is secrecy. The Prime Minister is able to make declarations without being answerable or accountable to the people.

The mechanisms of check and balances normally found within parliamentary democracies are absent in the Act and the NSC Act represents a quantum leap towards a dictatorship and a military-police state.

Additionally, the emergence of this Act raises a question of necessity. Malaysia has so many other legislations which are purportedly used for the prevention of terrorism for example POTA, SOSMA, a liberal use of other legislations, as well as sections in the Penal Code relating to terrorists. So how many levels of protection is the government laying out? That really is an issue. Having a string of legislations alone will not solve the problems.

SOSMA was used recently against Matthias Chang and Khairuddin and the charge had to do with sabotage of the economy and they were thrown behind bars and were in a prison for a month before they were brought to court. Matthias Chang was Khairuddin's lawyer and that is an attack on the legal profession as well.

That is the kind of abuse perpetrated by the government whenever it feels threatened. That is why civil activists are paranoid. The NSC Act can have huge repercussions.

In the case of Teh Cheng Poh v PP [1979] 1 MLJ 50, that talked about the Internal Security Act and the powers of the YDPA as the constitutional monarch, it said, "And except on certain matters that do not concern the instant appeal, He does not exercise any of His functions under the Constitution on his own initiative but is required by Article 40(1) to act in accordance with the advice of the Cabinet". This is precisely why civil activists are raising this question. Why was Parliament and Cabinet ready to give away all their powers to the Prime Minister? It is a reckless move by Members of Parliament, Ministers and all lawmakers as a whole.

Yes, it is undeniable that the whip system exists but legislation has been stopped before. Lawmakers have asked the government to hold back when they felt certain changes needed to be made. It was quite horrifying when we realised that the government was even prepared to ignore the rulers' requests for a review.

This Act does not reduce the possibility of terrorism. I think we have just opened the doors to more possibilities of terrorism.

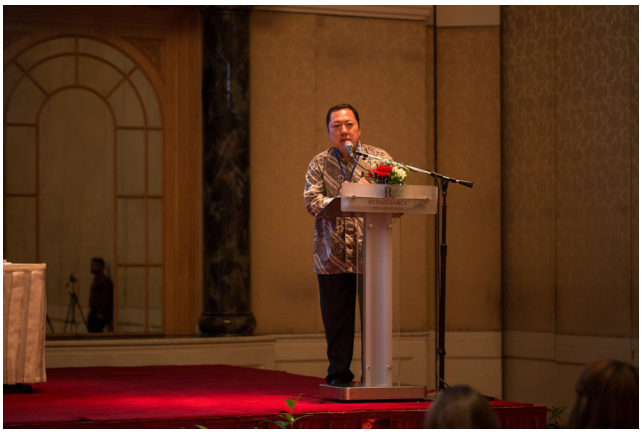
In conclusion, these are objections to the Act. It is not a question of amending the Act. We must repeal it in totality because the National Security Council was not set up for this purpose. The constitutionality of the Act is in question and there are issues relating to the chain of command in the military and it gives unlimited powers to the Prime Minister.

The safeguards provided in the act are illusory. The Act can be used in the next Bersih rally, and it can also be used to stop a general election. If

the Federal Government does not like the Penang government, they can declare Penang a security area. This legislation is in the hands of a very irresponsible government. It has been shown to be irresponsible based on evidence I have seen in the last few years. I have no confidence that this legislation will be used responsibly for the purposes which the government say they need it.

The people are aware of the importance of security. In fact, ordinary citizens are more worried about security than the government. We are concerned and what we are saying here is the government has enough legislation to deal with security issues. If one is referring to extremism in the country, it is home-grown. It happens when there is massive corruption, when there is authoritarianism. This Act does not reduce the possibility of terrorism. I think we have just opened the doors to more possibilities of terrorism.

The Federal Constitution and the National Security Council Act 2016



Mr Andrew Khoo
Bar Council Member & Co-chairperson, Human Rights Committee

On 1 August 1960, 56 years ago the ISA came into force. And today we have an Act, which came into force 56 years after the ISA, and many of the wordings are closely related or similar to the ISA.

Another connection with the ISA is the very fact that the NSC Act needed to be in place simply because the ISA was abolished. Some people talked about SOSMA, POTA and POCA as being the new ISA, but to me I think that this Act is really the successor to the ISA. And it may have actually come into existence by an act of omission. All emergency legislations were drafted under the ISA and when the ISA was repealed so were all the other emergency legislations. Emergency legislations are legislations enacted under a proclamation of emergency.

Some people talked about SOSMA, POTA and POCA as being the new ISA, but to me I think that this Act is really the successor to the ISA.

When the Prime Minister announced that he was going to abolish the ISA, he also said that Parliament would annul or revoke all 3 existing proclamations of emergency.

Because laws were made under the proclamations of emergency, the Attorney General's Chambers had to peruse the laws and check to see which laws were made under which emergency proclamation and which laws would have to be re-enacted.

If these laws are not re-enacted, it will be lost. Just to give you an example, one of the things the government did under the proclamation of emergency was to define the border of our territorial seas. So when the ISA was abolished, Malaysia needed to re-enact the Territorial Sea Act 2012.

Basically one of the things that went along with all these was the creation of the National Security Council. The National Security Council was established by an act of candid decision on 7 July 1971 and it was made law by the Emergency (Essential Powers) Ordinance No. 2, 1969. That was the law that created the National Security Council. As of June 2012, all the emergency legislation expired except anything that was re-enacted. The authority for the NSC expired as well. So from 21 June 2012 until 31 July 2016, the National Security Council, which was not dismantled, was basically operating without a cover of legislature; it had no legal authority.

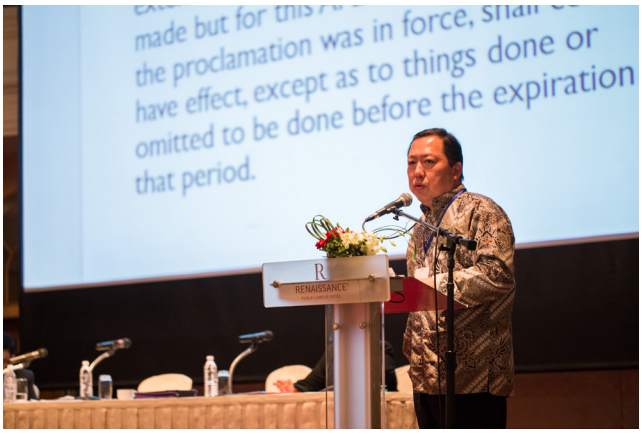
So, one of the things that the Act specifically provides for in Section 43 is to save everything that was done by the National Security Council prior to the Act coming into force. Section 43 basically says anything that was done by the National Security Council that was formed by the federal government prior to this Act is safe and any rules and regulations that were also made remains enforced. I think that was one of the critical reasons as to why there was a need at least in the initial period to rush to try and pass this legislation.

The other thing which is interesting that has not been touched is the executive authority of the Federation. The executive authority of the Federation lies in the King and that is stated in Article 39 of the Federal Constitution. What is interesting is that one of the emergency proclamations basically recites that the executive power resides with the King but for the purposes of emergencies, it will be delegated and so was the authority over defence under Article 41 of the Federal Constitution.

Under Article 41, the King is the Supreme Commander of the armed forces, and that is the executive authority held by the King. Under the emergency proclamation it was then delegated to the National Operations Council and that is how the National Operations Council during an emergency had operations and control over the armed forces.

When fast forwarded today, the National Security Council has operational control over the

conduct of the police and the armed forces. But the question is where is the delegation? There is no legislation, there is no regulation that passes the authority of the King to the National Security Council. This is, therefore, a violation of the Constitution because there is no explanation how suddenly a body called the National Security Council has operational control over the armed forces. The chain of command has been disrupted but there is no legitimacy, there is no legal document that provides for that switch in the chain of command from the King to the National Security Council. The armed forces council have been totally overlooked in the cause of the National Security Council Act.



The Act basically says that it advises the Prime Minister and the Prime Minister is to decide if a declaration for a security area should be made or not. The question is why should one country have two different frameworks for dealing with national security? One within the framework provided for in the constitution and one outside.

Why create a mechanism devoid of the Constitutional protections that have been carefully billed into the Federal Constitution. If one looks at the ministerial composition of the NSC, the holders of all the ministerial positions belong to one political party. The key designated ministerial positions in the NSC are currently run by members of one political party.

Many provisions in the Act allow for or violate the very fundamental liberties that the Constitution guarantees like right to life, freedom of movement and association and so on.

It also makes one wonder why it is so difficult to go to the King to declare an emergency. Essentially, that is one of the matters in the Constitution that is in His absolute discretion. There are certain matters a constitutional monarch has to abide by the advice of councils or ministers, but not in a proclamation of emergency. The King is capable of refusing to declare a proclamation of emergency if He feels that there can be a less draconian way to handle the situation.

Looking forward, one will need to also consider the change that is taking place amongst the monarch. We have a rotating monarchy and Malaysia is slowly seeing a generational change. Perhaps the younger generation within the monarchy have different views, maybe they want to flex their muscles, maybe they want to be a little more independent, maybe they want to disagree with the Prime Minister and this will be one of the ways to do so.

Therefore, one of the ways to avoid this is to set up an alternative structure where the government does not have to seek the consent of the King. I think that it is quite important for us to understand, although we have different views on the role of the monarchy in our democracy but this is something the founding fathers felt was important and as a lawyer, I can see the wisdom and danger of avoiding that check and balance.

Finally, many provisions in the Act allow for or violate the very fundamental liberties that the Constitution guarantees like right to life, freedom of movement and association and so on. Even Article 13 the right to property, is jeopardised by the fact that under an operational order of the NSC, the police force or military can go in and seize property, and even order for it to be destroyed.

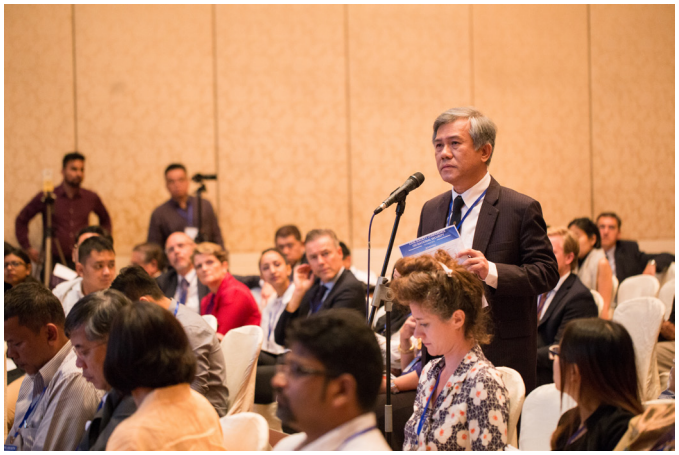
Yes, compensation can be provided for, but the affected party has to apply for compensation to the Director General of the NSC department. The Director General is the person that directs the breaking down of the property but the Act provides that compensation should be sought from him.

I want to read to you one section under the regulations of NSC Act, that this is the NSC taking temporary possession of land, building or movable property and demand for the use of resources and destruction of building and structure, Regulations 2016. So these are the things you cannot do in a declared security area.

I want to read to you paragraph b and c, " a person shall not possess any supplies for which he cannot satisfactorily account in circumstances which raise reasonable presumption that the supplies are intended for the use of any person with intend or is about to act or has acted in a manner prejudicial to the public security or the maintenance of the public order within the security area."

And paragraph c provides, "whether directly or indirectly supplies to any other person in circumstances which raise a reasonable presumption that the other person intends or is about to act or has acted in a manner prejudicial to the public security or the maintenance of the public order within the security area." If you look into the definition of "supplies", supplies include money, food, drink, clothing, medicine, drug and any other store instruments, commodities, article or things whatsoever.

So as Dato' Ambiga stated earlier, the Act can stop Bersih 5, and if the secretary of Bersih 5 starts



stocking up Bersih t-shirts in their office, and that office is declared to be a security area then mere storing of t-shirts or mere storing of bottled water or anything of that sort can fall under paragraph b and c and these are offences one can be imprisoned for.

The concern is that civil libertarian, any man or woman with any sense of what is fair and just will out rightly reject, and I, certainly, call for the repeal of the NSC as we, as concerned and caring citizens, who love our country and love democracy, that this is something we must vigorously oppose.

National Security, Constitutionalism & Human Rights in Pakistan

Mr Umar Khan
Lawyer & Consultant on Human Rights and Anti-Terrorism Laws, Lahore (Pakistan)

Some of the things that we talked about, the military, the dictatorship, the fear that Malaysian civil societies have about what can happen if it becomes the new law in Malaysia, all of those things have actually happened in Pakistan. We have lived under military rule for a good 25 years.

Pakistan is a good example in this case because it tells you some of the things that should be done but most importantly Pakistan warns us of things that should not be done and it seems that the Malaysian government is following the path of what should not be done. The death toll in Pakistan is 60,844 deaths (by some accounts more than 80,000, including 47,000 civilians) from 2003 till August 2016. This alone should be warning enough.

Pakistan is ranked 4th in the Global Terrorism Index Report 2015, after Iraq, Afghanistan and Nigeria. Malaysia is 49 on the same list, more secure than UK, USA and France and some other Western countries as well.

Recently, a year or so ago, a school was targeted and 45 children were killed in that school. So churches, hospitals, mosques, schools and residential houses within residential communities, kilometres away from any commercial activity were targeted. People that were targeted include our Prime Minister, an incumbent Governor of Punjab (Pakistan's biggest province), army generals, human rights lawyers. Just 10 days ago in Quetta, approximately 70 lawyers were killed. Quetta is a small town and just to put things in perspective.

I personally knew 3 lawyers in Quetta and 2 of them died in this blast. The civil society was specifically targeted. The Bar Association president was first shot down and his body was taken to the hospital. The suicide bomber waited for lawyers to gather there and then he detonated his suicide vest when all the senior lawyers were there.

The political reason behind this started after the Soviet's invasion of Afghanistan. The United States and Saudis feared the spread of communism and injected billions into Pakistan to promote the Jihadi narrative. The military ruler at that time ensured the proliferation and funding of Madrassahs (religious seminaries) in order to legitimise his own government and his own Islamisation. Islam is also used as part of the security set-up.

Without dealing with any of this systemic problems like no effective witness protection, Pakistan too came up with two laws, the Protection of Pakistan Act [POPA] and the Pakistan Army (Amendment) Act.

Recently after the US invasion of Afghanistan and Pakistan's support of the US-led coalition, the Taliban in Pakistan made a U-turn in 2006 and declared war against Pakistan. So how has the legal community dealt with some of these issues?

The Constitution of Pakistan is very decent when it comes to protecting civil liberties. On top of that, Pakistan has done something Malaysia has not done, which makes me feel very happy as a Pakistani in that we are a party to the International Covenant on Civil and Political Rights (ICCPR).

And the Supreme Court says in interpreting the fundamental rights within the Constitution, Pakistani courts have to look at for instance, Article 14 of the ICCPR and some of the other relevant articles. Some legislation also define human rights not just as rights within the Pakistani Constitution, but also rights we have ratified and in treaties and customary laws. The laws in Pakistan are comprehensive.

If one looks at the security regime of Pakistan, the main Act predates the rise of 9/11 so the law was enacted because the trials were not speedy enough and they needed a special court. A special court was created.

However, the definition of terrorism is so broad and so vague, although I do not think this is due to a problem in drafting. This is because vague definitions can be quite intentional as it happens all the time especially when it comes to defining some of the key terms.

At one stage, the conviction rate in Anti-Terrorism cases in Pakistan was two per cent. Without dealing with any of this systemic problems like no effective witness protection, Pakistan too came up with two laws, the Protection of Pakistan Act [POPA] and the Pakistan Army (Amendment) Act.

And at that time, the same questions were asked. Why does Pakistan need these laws? What is it about the other anti-terrorism laws that cannot do, that Pakistan can achieve with this law?

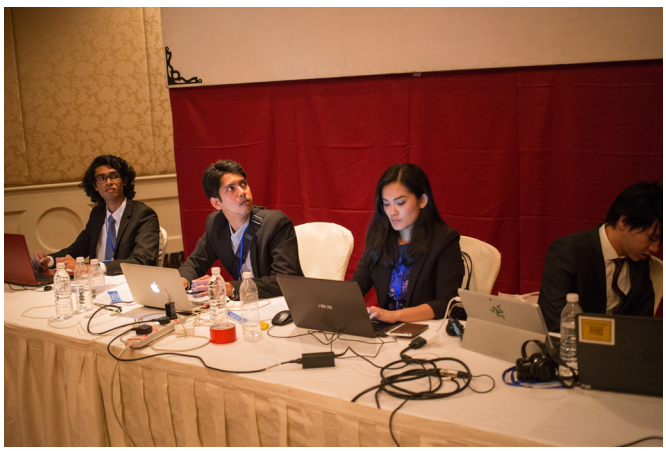
And there was never an answer. In the years that came, the law has been challenged and so the definitions are watered down. But I am sure there are other reasons why governments think new laws are the answer.

So the preamble of POPA is very similar to some of the other laws. Again, it is vague and broad. We do not know what national security is. There are powers to shoot to kill.

Was the Pakistan government involved with the Taliban? Similarly, Pakistan too had preventive detention. Although it was lawful, it often led to other violations such as torture, confessions; and I can say that with the lack of transparency under the National Security Council Act of Malaysia, some of these things are going to happen as well.

I also heard from the last speaker that the burden of proof shifts to the accused and that is problematic.

Therefore, how to balance rights with security? So essentially, what are the relevant questions to raise? I would raise them as follows:



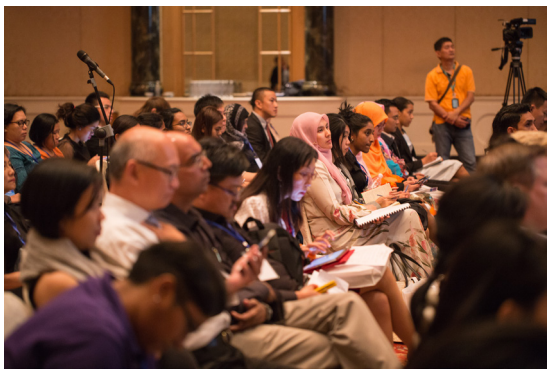
1.) What is the place of civil liberties in this trade off with security? It is a question easier asked than answered where it is undeniable that security is a fundamental right and a right to life issue.

2.) Deciding which measures are sustainable. For example some of the measures undertaken by the government today, to deal with extraordinary situations are going to become a norm for us.

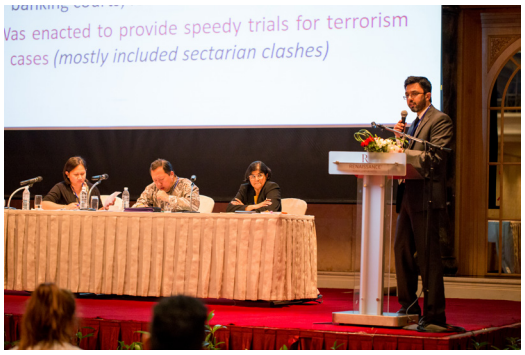
This is because if things do not change and 5 years from now, 10 years from now, everybody would not have realised the evolution undertaken by Malaysian society and how much the nature of Malaysian law would have changed, especially since Malaysia is not a party to the International Covenant on Civil and Political Rights.

One of the ways to balance rights is by distinguishing between derogable and nonderogable rights. The United Kingdom is a good example. Post 9/11, the United Kingdom lawfully derogated from the International Covenant and accepted that essentially there are certain rights that we cannot give to the people for this period of time and identified those rights expressly.

And reading some parts of the Malaysian Constitution, it seems that the Malaysian Constitution already envisages an emergency situation. So if it already envisages an emergency situation in Article 150, I really do not understand why this new law, the NSC Act, is required.



But like I said, it is a very difficult situation of how you balance civil liberties with your security. So, what measures are not sustainable? Some of these things have become part of our norm in the last decade. For instance, every new law that is drafted now has the burden of proof shift to the accused and the thing with these laws is that they're really effective. So in the short term, empowering the government with unfettered powers and granting them laws that provide the answer to terrorism seem like a feasible solution.



Pakistani police forces have never been known for their investigative skills so torture and the shift of the burden of proof is like a Christmas present for them. The only thing is they will never learn how to investigate cases and they will never learn how to interrogate without torture. This is also a problem that United States of America faced post 9/11 when it came to gathering information from foreign nationals. Pakistani police probably are never going to learn how to investigate cases properly because they can torture.

It seems that the Malaysian constitution already envisages an emergency situation. So if it already envisages an emergency situation in Article 150, I really do not understand why this new law, the NSC Act is required.

Killings and detentions clearly can never be allowed. It seems that the NSC has some of those elements as well. An example of that is when a police officer decides that force has to be used, he can use that force but what is the oversight and what is the planning that takes place in making that decision?

Malaysia is not a ground for terrorism as it is for Pakistan. I do not think Malaysia is at the point where it has to make the kind of hard choices Pakistan has to make. We now have to decide whether we live in a Pakistan, where there is an occasional bomb blast and we have civil liberties where it is completely terror free. But I think as a human rights advocate, as a civil society, we decided we want to live in a Pakistan where we can live with a terror attack and not forgo our civil liberties. I think Malaysia will have to make that choice in the years to come but probably not right now and I think that is the right choice.

National Security Laws/ Policies and International Human Rights Standards

Ms Emerlynne Gil
Senior International Legal Adviser, International Commission of Jurists, Bangkok (Thailand)

I would like to comment on the perceived tension between protecting the public from national security threats vis-a-vis protecting human rights.

If one looks at this report, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights developed by the ICJ in 2009. This is a global study, which was developed by International Commission of Jurists. The study was started in 2005 and the report was completed in 2009. Everything here is still very relevant to the discussion today.

On the perceived tension between addressing national security threats vis-a-vis protecting human rights, the interest of fighting terrorism or upholding national security does not collide with the interest of promoting human rights. There is no contradiction, there is no inconsistency. Promoting and protecting human rights is a key element in fighting terrorism and protecting national security. It is an effective weapon in defending democratic societies like Malaysia.

Protecting human rights requires an independent judiciary. People should be assured that even in the face of violent attacks, they will get fairness and accountability from their judiciary. A well-operating criminal justice system will definitely deter terrorism. It will disrupt terrorist networks, it will catch and punish those who commit crimes and ensure the release of those mistakenly caught.

Human rights will address and remedy genuine grievances that may encourage terrorism or violent extremist actions. Sometimes violent conflicts are caused by genuine grievances. Genuine grievances are exploited by terrorists for their own ends. Governments that violate human rights feed and fuel into these grievances. Clear commitment to respect and protect human rights to bring to an end to real or alleged grievances or secure greater legitimacy for its counter-terrorism efforts.

The national security doctrine is not new. In fact, when the ICJ started developing this report in 2005, it did not look at the present situation, the counter-terrorism efforts during that period of time. But it looked at how national security threat and terrorism issues were dealt with in the past. This was done by the ICJ to see whether the threat that we are facing now is indeed exceptional and unprecedented as claimed by many government authorities. It is always argued that the threats we are facing now are exceptional and unprecedented. Therefore, it is always argued that it is necessary to have exceptional responses.

People should be assured that even in the face of violent attacks, they will get fairness and accountability from their judiciary.

It has become a common argument adopted by governments today that threats existing now are exceptional. The ICJ however found that this is a problematic argument. It risks justifying the introduction of measures that may be violative of human rights. It also risks blinding governments to the mistakes made in the past that may happen again. All these threats have happened in the past. This is not new. This is not just happening now.

The national security doctrine was around even in the 1970s and adopted by a number of Latin American states. This was also adopted in the war against communism from 1948 to 1960. By examining what happened in the past, the ICJ concluded that there are lessons that we have forgotten. The lesson in particular that I am going to point out is that there is a danger of using an approach where the concept of national

security is broadly and ambiguously defined and this has been discussed over and over again by several of the panellists today.

There is great danger in not providing adequate safeguards to ensure that derogations in times of emergency are in line with international law. It is dangerous to define national security broadly and ambiguously.

Broad language in national security laws opens doors to wide discretionary powers without clear legal limits on implementation. If a State has broadly drafted laws for national security, it can actually result in imposing impermissible restrictions on the rights to freedom of information, freedom of expression and freedom of assembly and association.

Malaysia is not a state party to the ICCPR but I would like to quote the United Nations Human Rights Council, noting that it is still the main

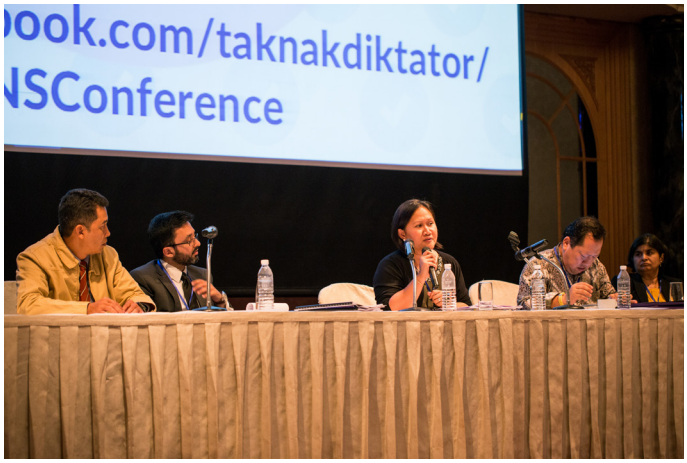
> Promoting and protecting human rights is a key element in fighting terrorism and protecting national security. It is an effective weapon in defending democratic societies like Malaysia.

source of human rights standards. The United Nations Human Rights Council has criticised the vague concept of national security as well as its application as a basis for arresting a person without citing a specific charge.

The United Nations Human Rights Committee had also said that this was creating an atmosphere of fear and oppression for anyone critical of the government. And the United Nations Human Rights Committee has always recommended the concept of national security to be clearly defined by law.

The second lesson that we have not learned as a human race is perhaps that it is always dangerous to not provide adequate safeguards to ensure that derogations in times of emergency are in line with international law. When a state of emergency is enforced, it is really very crucial that effective mechanisms are in place to supervise or to limit the exercise of the State's special powers and that there are independent and impartial and effective bodies that are mandated to review and monitor the exercise and the necessity of the maintenance of such powers.

This is to ensure that human rights are not unnecessarily or disproportionately limited. There



is always the claim that international human rights laws cannot accommodate the type of threats that we are facing now. However, we have to always remember that the experts who drafted some of these key international human rights instruments, at the time they were drafted, these people, these experts and human beings had just come out of the darkest chapter of the 20th century and probably, all of human history. They knew very well, the potential for abuses brought about by wars. The key international human rights instruments were not drafted within the context of peace and stability. These international human rights laws were drafted primarily so that states would be able to respond to the most serious of crisis and the most serious of wars.

APPENDIX

CONTENTS

CONCEPT PAPER

CONFERENCE ON THE NATIONAL SECURITY COUNCIL ACT 2016: IMPLICATIONS ON NATIONAL SECURITY & HUMAN RIGHTS

On 7 June 2016, the National Security Council Act 2016 (NSC Act) was gazetted as law despite concerns raised by many parties, including civil society, elected representatives, legal fraternity, military veterans, and the Conference of Rulers.

The NSC Act has elevated the legal status of the existing National Security Council and provided for the declaration of security areas, special powers for security forces, and the merging of military and police intelligence. The features of the Act that drew the most attention were:

1) the power granted to the Prime Minister to command the military without recourse to the constitutional chain of command which flows from the Yang di-Pertuan Agong; and,

2) the creation of a separate mechanism whereby the Prime Minister can effectively proclaim a "security area" that is renewable every six months, which effectively duplicates the constitutionally-enshrined power of the Yang di-Pertuan Agong to declare a state of emergency under Article 150 of the Federal Constitution.

"National security" is not expressly defined in the NSC Act. This gives the Prime Minister and the NSC wide powers to declare almost anything a threat to national security even though it does not amount to a proven threat that would justify the involvement of the military.

For example, in May 2016 the existing NSC led an effort to evict illegal farmers from the Cameron Highlands. While it remains unclear to what extent the military was involved in this eviction operation, it raises concerns about the scope of national security under the purview of the NSC, and the casual deployment of the armed forces on Malaysian soil - not for resolving state-to state conflict - but for matters usually handled by domestic enforcement agencies.

There are thus concerns that prudent and proper lines separating civilian and military affairs may be unduly blurred by the NSC Act. A section of the NSC Act providing for the merger of military and police intelligence also raises concerns of losing independent check and balance or independent verification of possible national security threats.

The declaration of a "security area" allows authorities arbitrary powers of violence and deadly force, warrantless arrest, search and seizure, and imposition of curfews. The NSC Act empowers the authorities to take possession of land, buildings and moveable property (both public and private), and to destroy any unoccupied building or structure within a security area. These provisions give rise to concerns of impunity as the NSC Act allows a magistrate to dispense with inquests of members of security forces and persons killed within the security area, as long as the magistrate is satisfied that the person is killed in the security area as a result of operations undertaken by the security forces.

A hurried legislative genesis

Despite the critical issues raised in the voluminous NSC Bill - consisting of over 40 clauses and spanning 30 pages - parliamentarians were only given two days to study the Bill, after which it was passed after only six hours of debate by the Lower House of Parliament on 1 December 2015.

On 17 February 2016, the Conference of Rulers informed the government that certain provisions of the NSC Bill must be "refined" and sent back to the Attorney-General's Chambers for amendments. No updates on this request were reported until the public learned that the Bill was gazetted as law on 7 June 2016. The gazetted Act displays no revisions from the Bill passed by Parliament

in 2015. At the time of writing the NSC Act has not yet entered into force.

The NSC Act, Legality of Security Operations, and Parliamentary Democracy

The NSC Act's emergence has led to concerns that the concentration of military and political power in the hands of the Prime Minister would com promise Malaysia's democracy. In a region boasting several military dictatorships and countries recently emerging from dictatorship, Malaysia has often been the lone representative of parliamentary democracy, however challenging its career has been. There are concerns that with the NSC law now passed, the struggle towards a mature democracy may come to a premature end.

The government has argued that the NSC law and its associated powers are necessary to maintain Malaysia's national security, which was last tested in the 2013 Lahad Datu incursion in eastern Sabah.

Army sources claimed that the 2012 abolition of the Emergency Ordinance (EO) and Internal Security Act (ISA) had both ended a constitutional state of emergency and left the army without a strong legal basis for operations on Malaysian soil. Based upon the constitutional authority of the Yang di-Pertuan Agong to declare an emergency, the EO and ISA both provided for military operations on Malaysian soil in the context of the guerrilla insurgency and the Confrontation with Indonesia up till the end of the 1980s.

In the absence of a nationwide proclamation of emergency, the presence of the military in the Lahad Datu incursion was authorised under a Sabah state ordinance empowered by the Yang di-Pertuan Agong. Thus, there appears to be a desire from the military to consolidate the pre-2012 legal framework that governed military operations - a framework that comprised:

(i) NSC Orders issued by the Cabinet, (ii) EO subordinances, and (iii) the provisions of Part III of the ISA that relate to the proclamation "security areas" - and elevate them into an Act of Parliament, through the NSC Act. The present NSC Act appears to be primarily derived from these three sources.

What appears significant from a constitutional standpoint is that the pre-2012 legal framework for military operations is empowered by declarations from the Yang di-Pertuan Agong pursuant to Articles 149 and 150 of the Federal Constitution. The legal framework post-NSC Act provides for similar powers, but does so in the absence of constitutional authority from the Yang di-Pertuan Agong.

Besides the concerns about expanding executive power, there is the question of whether military actions under the NSC Act will be legal if they are authorised without the constitutional chain of command, and consequently the question of legal jeopardy for members of the armed forces for actions taken in the field.

Thus, there are legitimate bases for concern about whether the NSC Act represents a new baseline for the future operation of the armed forces, and whether this baseline is both legally sound and desirable from the standpoint of a civilian-led parliamentary democracy.

Is it proper for the military to be permanently mobilised in the absence of a declaration of emergency? The military is supposed to defend Malaysia from other nation-states, should the military be involved in domestic security which is properly the purview of the police?

This Conference

Questions about the worrying provisions of the NSC Act, its constitutionality, its effectiveness in promoting national security, its relationship to existing measures blurring the line between civi lian enforcement and military agencies, and its desirability from the standpoint of healthy parliamentary democracy and legally-sound security operations in Malaysia therefore require further discussion and deliberation.

We also see this as an important opportunity to bring the government, human rights, legal and the security community into closer and constructive dialogue on matters of national interest.

To that end, this conference proposes to grapple with the following issues:

1. What is the NSC, including scope and function?

2. With Malaysia's emergence as a sovereign state taking place amidst insurgency and regional conflict, followed by domestic political and social upheaval, what is the relevant historical background to Malaysia's security framework and apparatus?

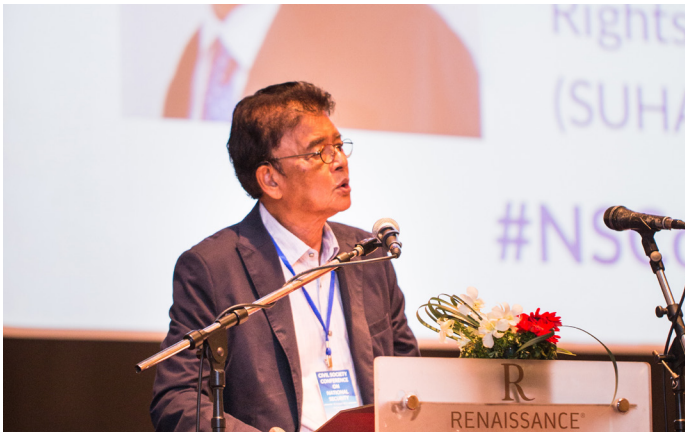
3. Is the NSC Act legally and constitutionally sound? Does it compromise human rights, rule of law and parliamentary democracy?

4. How does the NSC and Malaysia's security framework and apparatus measure up to comparable institutions, particularly in states facing clear and present security threats? Possible cou ntries of focus: UK, France, Indonesia.

5. Does the NSC Act service or set back Malaysia's national security? Does it and should it provide the primary legal basis for military operations? Should the military be permanently mobilised?

6. What is the way forward for resolving the constitutional, security, military, law enforcement, human rights and humanitarian concerns? What checks and balances could be introduced? How might constitutional monarchy and parliamentary democracy be upheld?

SPEAKER'S BIOGRAPHY



Tan Sri Razali Ismail

Tan Sri Razali Ismail retired from government in 1998, after 10 years as Malaysia's Permanent Representative to the United Nations, earlier postings, and altogether 35 years in service. At the UN, Razali Ismail served in various capacities: the Group of 77, the UN Security Council, the Commission on Sustainable Development and as President of the General Assembly developing positions on development, sustainability, governance, UN reforms, and on political/security.

Tan Sri Razali is also the ProChancellor of Universiti Sains Malaysia. He heads an NGO foundation namely Yayasan Chow Kit that looks into the welfare of displaced children, sits on the Board of the Razak School of Government, and is the Chairman of the Global Movement of Moderates Foundation. He was appointed as the Chairman of the Human Rights Commission of Malaysia (SUHAKAM) in June 2016 for the term 2016-2019.

Ms Emerlynne Gil

Emerlynne Gil is the Senior International Legal Adviser of the ICJ for Southeast Asia. Her work at the ICJ involves providing legal analysis to human rights cases in Southeast Asia, particularly focusing on national security laws and women's human rights issues. She is also the ICJ's focal person for the Association of Southeast Asian Nations (ASEAN), looking at the current efforts around the establishment of a regional human rights mechanism in Southeast Asia. Prior to joining the ICJ, she led initiatives at the regional and international levels for the implementation of standards under the UN Declaration on Human Rights Defenders as head of the Human Rights Defenders Department of the Asian Forum for Human Rights and Development (FORUMASIA).

SPEAKER'S BIOGRAPHY

Dato' Ambiga Sreenevasan

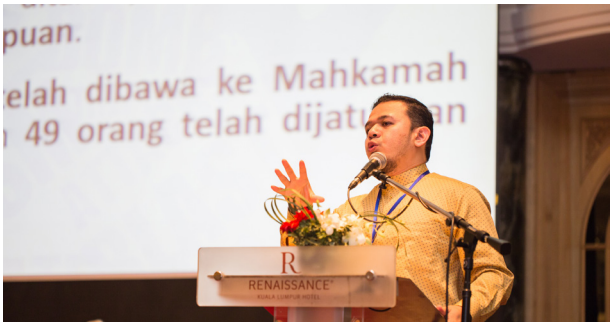
Dato' Ambiga Sreenevasan was the President of the Malaysian Bar from March 2007 to March 2009. Of all her many involvements, she is best known for her role as chairperson of Bersih 2.0, from 2010 to Jan 2011 and co-chairperson from Jan 2011 to Nov 2013.

Throughout her career, Ambiga has been an advocate of human rights issues and the promotion of the rule of law. She is a recipient of the United States Secretary of State's International Women of Courage Awards 2009. She was conferred an Honorary Doctorate of Laws (Hon LL.D) by the University of Exeter in 2011 and also awarded the "Chevalier de la légion d'Honneur" (Knight of the Légion of Honour) by the Government of France in 2011.

She is currently president of the National Human Rights Society (Hakam). She is also a patron of NegaraKu, a people's movement to reclaim Malaysia focusing on the agenda of unity, peace and harmony.

Mr Nicholas Chan

Nicholas Chan is the founding member and research associate of IMAN Research. An Asian Studies graduate from the S.Rajaratnam School of International Studies, Nicholas specialises on Southeast Asian politics and political violence. His masters' dissertation critically examines how the Malaysian state grapples with 'terrorism' and the 'Islamic State' throughout history as it navigates its own political exigencies, the rise of Islam as an opposing force, and also the advent of the age of 'terror' in the global arena. He is also a former columnist of The Malaysian Insider.



Dr Fathul Bari Mat Jahya

Dr Fathul Bari Mat Jahya is an Islamic scholar from Malaysia and Exco of UMNO Youth that is active in conducting religious discourse and sermons in Malaysia and overseas. He is also a member of the Prevention of Terrorism Board under the Prevention of Terrorism Act 2015 (POTA).

SPEAKER'S BIOGRAPHY

Ms Sidney Jones

Ms Sidney Jones is the Director and Founder of the Jakarta-based Institute for Policy Analysis of Conflict. The mission of the Institute is to explain the dynamics of conflicts in order to help with peaceful settlement and make recommendations to policy-makers.

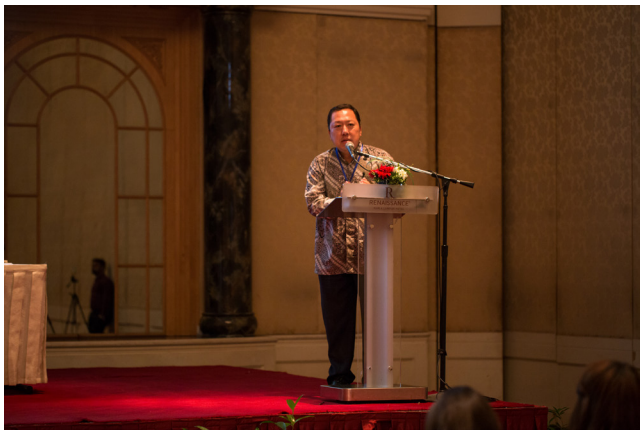
Before founding the Institute in 2013, Sidney worked with the International Crisis Group from 2002 to 2013, first as Southeast Asia project director, then from 2007 as senior adviser to the Asia program. She also previously served as Asia Director for Human Rights Watch (1989-2002), Indonesia-Philippines Researcher for Amnesty International (1985-1988), and Program Officer for the Ford Foundation (1977-1984).

Sidney holds a B.A. and a M.A. from the University of Pennsylvania and received an honorary doctorate in 2006 from the New School in New York. She is the author of the book "Making Money Off Migrants: The Indonesian Exodus to Malaysia (2000)" and an expert on conflict in Southeast Asia, human rights in Asia, and violent extremism including pro- ISIS networks, with a special focus on Indonesia.

Mr Umar Khan

Umar Khan is a barrister who practices law on the criminal side and has represented, among others, General Pervez Musharaf, Mr. Saud Aziz (Benazir Bhutto assassination case) and a former Guantanamo Bay detainee for his extraordinary rendition by USA, UK and Pakistan. Simultaneously, his vast experience in the area of law has landed him multiple opportunities as a consultant to various organisations, predominantly touching on human rights. He drafted Pakistan's initial report on UNCRC optional protocol, and is the co-author and editor of Criminal Practice Manual for antiterrorism prosecutors in Pakistan. He has trained over 100 antiterrorism prosecutors, and also teaches human rights law at University College Lahore.

SPEAKER'S BIOGRAPHY



Mr Andrew Khoo

In legal practice for 21 years, he is currently serving his 8th year as an elected member of the Bar Council Malaysia and is co-chair of the Human Rights Committee and co-chair of the Trade in Legal Services Committee. He also chairs the Ad Hoc Committee on the Trans Pacific Partnership Agreement and the Subcommittee on Anti-Money Laundering and Anti-Terrorism Financing. He has represented the Malaysian Human Rights Commission (SUHAKAM), the Malaysian Bar, the Council of Churches of Malaysia and the Bible Society of Malaysia in watching briefs before the Federal Court, Court of Appeal and the High Court, including cases involving election petitions, constituency redelineation, child custody, citizenship and freedom of religion.

He has also appeared as observer counsel before several SUHAKAM public inquiries. He has briefed Members of Parliament on the death penalty, the position of refugees and asylum seekers in Malaysia, the DNA Identification Bill, the Personal Data Protection Bill, the Legal Profession (Amendment) Bill, the International Criminal Court and the National Security Council Bill, and spoken in parliamentary forums on proposed amendments to the University and University Colleges Act 1971, the United Nations Universal Periodic Review on Malaysia in 2009 and 2013, and on the Trans Pacific Partnership Agreement. He has also addressed various issues of human rights in Malaysia at the Human Rights Council and the United Nations High Commission for Refugees, both in Geneva, at the European Union in Brussels, as well as regionally and locally. He gave evidence before the Parliamentary Select Committee on Electoral Reform on behalf of the BERSIH 2.0 Steering Committee, of which he was a member until November 2013. He authored the chapter on Law and the Judiciary in the Annual SUARAM Report on Civil and Political Rights in Malaysia from 2007-2014 and 2016, and his articles have been published in The New Straits Times, The Sun, Malaysiakini, The Nut Graph, Micah Mandate, the Wall Street Journal and on the Malaysian Bar website and journal.

CONFERENCE SCHEDULE

No.	Time	Topic	Speakers
1	8:30am- 9:30am	Breakfast and Registration	
2	9:30am- 9:35am	Welcome Speech	Shamini Darshni, Executive Director, Amnesty International Malaysia on behalf of the Organising Committee
3	9:35am- 10:15am	Keynote speech	Tan Sri Razali Ismail, Chairman, National Human Rights Commission of Malaysia (SUHAKAM)
4	10:15am-10:30 am	Tea/ Coffee Break	

National Security: Past and Present in Malaysia & ASEAN

5	10:30am- 12:30pm	History of Malaysia's security framework and apparatus (including the Lahad Datu, Sabah armed incursions)	Nicholas Chan, Research Director, IMAN Research
		Malaysia's present national security concerns and threats	Dr. Fathul Bari, Member, Prevention of Terrorism Board under the Prevention of Terrorism Act 2015 (POTA)
		National Security Council Act 2016 - How it impacts the Armed Forces	Mr. Mohd Daud Sulaiman
		National security and cross border terrorism in Asean	Ms. Sidney Jones, Director, Institute for Policy Analysis of Conflict, Jakarta (Indonesia)
6	12:30pm- 1:30 pm	Lunch	

CONFERENCE SCHEDULE

National Security: Law, Constitutionality & Human Rights

7	1:30pm- 3:30pm	Human Rights, Democracy and the National Security Council Act 2016 The Federal Constitution and the National Security Council Act 2016 National Security, Constitutionalism & Human Rights in Pakistan National Security Laws/ Policies and International Human Rights Standards	Dato' Ambiga Sreenevasan, spokesperson for civil society coalition Mr. Andrew Khoo, Bar Council Member & CoChairperson of the Human Rights Committee Mr. Umar Mahmood Khan, Lawyer & Consultant on Human Rights and Anti-terrorism laws, Lahore (Pakistan) Ms. Emerlynne Gil, Senior International Legal Adviser, International Commission of Jurists, Bangkok (Thailand)
8	3.30pm-4.00pm	Press Conference	Organising Committee
9	3:30pm-4.30pm	Tea/ Coffee Break	

EXPLANATION PROVIDED BY THE NATIONAL SECURITY COUNCIL ON THE ISSUES RAISED REGARDING THE NATIONAL SECURITY COUNCIL BILL 2015

COMMENTS ON ISSUES RAISED ON THE NATIONAL SECURITY COUNCIL BILL 2015

1.Claims that the NSC Bill 2015 is invalid (unconstitutional) as it is contrary to Article 149 of the Federal Constitution 1957.

1.1.This Bill was not made pursuant to Article 149 of the Federal Constitution. It was made under the authority of Parliament following Article 74(1) of the Federal Constitution read with Sections 2 and 3 of the Federal Constitution. Clause 1 of Article 74 of the Federal Constitution allows for Parliament to make laws with respect to certain matters; among others, those that are set out in List I of the Ninth Schedule.

1.2.The areas of "defence of the federation" and "internal security" are matters which are clearly listed under Sections 2 and 3 and in List I of the Ninth Schedule. As such, the NSC Bill is a law for the purposes of national security which falls under the jurisdiction of Parliament to legislate on, and is at the same time under the purview of the executive branch of the Federation.

1.3.The Bill does not affect the rights protected under Articles 5, 9, 10 and 13 of the Federal Constitution. Therefore, there is no need to have a "recital" in the Bill to say that the Bill is made under Article 149 of the Federal Constitution. Furthermore, this Bill does not create any new offences nor utilize any procedures that are not already available in the present laws. The objective of this Bill is not to declare a state of emergency but rather to enable a security area to be declared.

2.The claim that this Bill highlights the dictatorship of the Prime Minister when only the Yang di-Pertuan Agong (YDPA) is supposed to have the power to make a Proclamation of Emergency

2.1.The objective of this Bill is not to issue a Proclamation of Emergency under Article 150 of the Federal Constitution but instead to allow for the declaration of a security area. There is a significant difference between a state of emergency and a security area. An emergency can only be proclaimed by the YDPA and will have to be of a large scale (grave emergency) and not an ordinary security threat. On the other hand, a security area will be declared when "the security in any area in Malaysia is seriously disturbed or threatened" rather than when there a "grave emergency". This means that the threshold for a declaration by the Prime Minister of a security area is lower compared to the threat level for a proclamation of a state of emergency by the YDPA. So, there is no issue of a "power grab" or "promoting a dictatorship". The power to proclaim an emergency remains with the YDPA under Article 150 of the Federal Constitution.

2.2.Due to this, the Prime Minister has limited power under the Bill. The Bill does not conflict with the Federal Constitution. Apart from that, the national security landscape is not the same as it used to be. With this Bill, the Government can smoothen operational management in security areas to maintain harmony with the people in this country. This Bill is not negative but intends to provide security for all Malaysians including members of the opposition.

3.The claim that this Bill is designed to ensure the importance of the Prime Minister and UMNO.

3.1.The Bill seeks to formally establish the National Security Council which will be the agency responsible for formulating and coordinating national security policies to ensure the security of the people and this country. Like any National Security Council outside of the country, the NSC will be chaired by the Prime Minister or President and has its members appointed. Its aim is to ensure national security and is not for the Prime Minister, UMNO or any other interested party to advance their own interests.

4.The claim that the Malaysian Armed Forces (MAF) should stay under the authority of the YDPA but was taken over by the Prime Minister under the Bill.

4.1.The YDPA does not perform operational command of the MAF. The YDPA is the Field Marshall of the MAF, the ceremonial chief symbol of the military. In terms of operational implementation in a non-war situation, the

MAF has no legislative power to carry out national security operation tasks. Due to this, the Bill is important as it enables the MAF to carry out operations which tackle national security threats.

5. The claim that the Bill was not given to the Council of Rulers and the YDPA to be consulted first before being debated in the Dewan Rakyat.

5.1. The Bill is drafted pursuant to Parliaments' legislative power under the Ninth Schedule of the Federal Constitution. Therefore, there is no need for the Council of Rulers to be consulted on the Bill because it is not a law that directly impacts the privileges, position, dignity or eminence of the Rulers.

6. The claim that the security threats faced by the County are not so serious that it requires the drafting of this Bill.

6.1. Threats to national security could occur unexpectedly at anytime and anywhere unexpectedly. The question is, how ready are we as a nation to deal with cross border security threats which are immensely complex and which could undermine national security and the welfare of the people? Due to the complex and dynamic patterns of today's threats, the Government needs to strengthen their mechanisms and systems in the formulation of security policies, intelligence-sharing and in providing instant responses by integrated Security Forces toward security threats that are beyond the capabilities of individual agencies. We can not wait for a certain incident or threat to happen, and only then act on it because it might already be too late - lives would have been lost and property would have been damaged.

6.2. The terrorist attacks in Lahad Datu in 2013 provided a useful lesson for Malaysia. Following the incident, the Government declared a security area in Sabah (ESSZONE) and not a state of emergency under Article 150 of the Federal Constitution. Through the declaration of a security area, public order in that area had been restored and residents' basic rights were guaranteed. If the proclamation of a state of emergency under Article 150 of the Federal Constitution was made, then all political, economic and social activity would be completely paralyzed. The state of emergency will be an inconvenience in the daily lives of Sabahans.

6.3. Aside from that, the Bill was created following the repeal of the Emergency Ordinance 1971 and the Emergency Act 1979 in 2011. Today's Bill is administered based on a decision made at Cabinet Meeting in 1971. The existence of administrative action has adversely affected the direction and coordination by the NSC on Security Forces and government agencies related to National Security.

6.4. This Bill would empower the NSC to coordinate concerted action among members of the Security Forces. It also empowers the Security Forces to handle threats which occur in the declared security area(s).

7. Does the Bill erode the special rights of Sabah and Sarawak?

7.1. This Bill does not erode the privileges enshrined in the Federal Constitution. Matters relating to national security are under the jurisdiction of the Federal Government as afforded by Sections 2 and 3 of the Federal Constitution. Given that Sabah and Sarawak are part of Malaysia, their security also falls under the purview and responsibility of the Federal Government.

8. Why is there no definition of national security in this Bill?

8.1. There is no specific definition of "national security" because national security is a dynamic threat and varies according to current situations. Other countries also do not provide a definition of "national security" in their respective National Security Council Acts; with the exception of Antigua & Barbuda.

8.2. However, in the context of the NSC 2015 Bill, national security can be defined as "protecting the country from any threats that affect the sovereignty, state integrity, socio-political stability, economic stability, strategic resources and any interest relating to national security as provided for in Clause 4(a)." These are the elements of national security which are part of the national interest and therefore they need to be upheld and protected at all times.

9. Why are there no State Representatives in the National Security Council?

9.1. National Security is under the jurisdiction of the Federal Government as provided for under Article 74 of the Federal Constitution. If State Representatives need to be consulted, then they may be invited to an NSC meeting in accordance with Clause 10 of the Bill.

10. Why is the State NSC Chairman not the Chief Minister as it is in Barisan National controlled states?

10.1. The management of National Security is under the jurisdiction of the Federal Governments as prescribed under Article 74 of the Federal Constitution. Due to this, the Prime Minister as the NSC Chairman is entitled to appoint anyone he chooses as the State Security Chairman. Nevertheless, all Chief Ministers/Ministers are informed on the security situation in their respective states from time to time.

11. Why does Clause 11 of the Bill give such wide powers to the Council to determine the procedures in respect to enforcement procedures?

11.1. Clause 11 of the Bill enables the Council to determine the internal procedures which are relevant to the matters that need to be discussed in meetings and matters about the administration of the Council. Clause 11 does not aim to enable the Council to create enforcement procedures because matters pertaining to enforcement are allocated in Part V of the Bill.

12. What is the difference between the effect of a Proclamation of Emergency and a declaration of a Security Area?

12.1. A proclamation of a state of emergency will cause the local state administration in the area of the proclaimed area to be under the control of the Federal Government and all political, economic and social activity will be paralyzed. The right to move freely will be blocked. However, the declaration of a security area will not affect activities of the population and the administration of the affected state. administration. It serves to allow security forces to be deployed in order to control the threat in the region.

13. Why are overly broad powers granted to the Prime Minister in relation to the declaration of a security area?

13.1. The power of the Prime Minister under Clause 18 is to declare a security area based on the advice of the Council who are composed of individuals that are qualified and have the requisite knowledge in terms of National Security. Therefore, the claim that the Bill gives wide powers to the Prime Minister is unfounded.

14. Why are visiting forces able to mobilize for duty in the security areas and is this power automatic within the Bill?

14.1. Clause 19(2) of the Bill provides that the Council may issue an executive order for the deployment of Security Forces. In this respect, visiting forces are subject to the direction of the Council's Operations Director which is specified in this Act. As a result, visiting forces do not have automatic power under the Bill.

15. Are the powers that control the movement of security forces contrary to Article 9 of the Federal Constitution relating to the Freedom of Movement?

15.1. Article 9(2) of the Federal Constitution allows for every citizen to have the right to move freely over the federation and reside anywhere. Nevertheless, freedom of movement is subject to any law that relates to federal security, public order, public health or sentences.

15.2. Clause 24 of the Bill allocates power to the Operations Director to deploy any Security Force units in the area to safely control the movement of any person or any vehicle, vessel, aircraft or conveyance; they may also prohibit the use of a street or road in the security area.

15.3. As such, Clause 24 of the Bill is a legal provision enacted to maintain public order and national security, and this does not conflict with Article 9(2) of the Federal Constitution.

16. Why is the Magistrate or Coroner authorized not to make an inquiry or inquest into the death of persons found within the security area under Clause 35 of the Bill?

16.1. Clause 35 only gives the discretionary power to the Magistrate or the Coroner to waive the procurement of a death inquiry or inquest on the body of persons if they are satisfied that they had been killed in the Security Area due to an operation carried out by the Security Forces.

16.2. The provision has been inserted to enable the Magistrate or Coroner to not carry out an inquest nor to require further investigation (post mortem) to determine the cause of death where the cause of death is clear,

16.3. However, if the Magistrate or Coroner is in doubt about the cause of death of any member of the Security Forces or any person in the security areas, the Magistrate of the Coroner can still procure a death inquiry or inquest based on powers fixed under Section 328 to 338 of the Criminal Practice Code. If the deceased's family is dissatisfied with decision made by the magistrate or the coroner, they may check under Section 341a of the Criminal Procedure Code as was done in Teoh Beng Hock's case.

17. Does the protection from law-suits under Article 38 and under Clause 40 of the Bill provide for total immunity for Member's Security Forces against any action that the Council has taken under the Bill?

17.1. Clause 38 gives protection to any member of the Council or committee, the Director of Operations, or any member of the Security Forces or personnel of other Government Entities in respect of anything done or omitted by them in good faith (in good faith).

17.2. However, in the event that an act or omission is malicious then this protection will not apply. Determination whether an act or omission is honest or not is the factual one (question of fact) that will be decided in court.

17.3 Meanwhile, Article 40 has applied the time limits (time limitation) from the Public Authorities Protection Act 1948 for the purposes of commencing legal proceedings. This means that any legal proceeding against any member of the Council or committee, the Director of Operations, or any member of the Security Forces or the personnel of other government entities indicated in Clause 40 of the Bill should be initiated in no more than 36 months (3 years) from the date of the act in question.

18. Why has the Prime Minister been given such wide powers to make regulations?

18.1. Like all laws, the power to make regulations has always been generally set out as stated in Clause 42(1) of the Bill. Although it is seen to be wide, the power is used for the purpose of carrying out or enforcing provisions of this Act; in other words, within the four walls of the Act. Such power can be seen in the Prevention of Terrorism Act 2015 (POTA), the Medical Device Act 2012 and so on.

18.2. If the Prime Minister makes regulations which are ultra vires the Act, those regulations may be challenged in court. As a result of this, there is no "absolute" power given under the Act.

CONCLUSION

The Bill was drafted to ensure that national security is always maintained and effectively managed. This Bill does not intend to take power away from the YDPA and does not breach the basic rights of the Malaysian people which are guaranteed within the Federal Constitution.

National Security Council
Prime Minister
December 2015

PROPORTIONALITY NEEDED WHEN CONFRONTING TERRORISM

by

Sidney Jones
Institute for Policy Analysis of Conflict (IPAC)
written for the Civil Society Conference on National Security
Kuala Lumpur, 18 August 2016

The risk of terrorism has increased in Southeast Asia over the last twelve months, primarily but not exclusively from ISIS supporters. The bombings in Thailand last week were almost certainly not ISIS-linked, for example, nor are many of the kidnappings in Mindanao and the Sulu Sea, though there are question marks over a few. The reason security forces across the region are getting increasingly nervous, however, and one reason many are rushing to pass tougher legislation, is because of concerns that the ISIS leadership seems to be taking more of an interest in Asia.

These concerns are well-founded, and but that should not mean throwing the principle of proportionality out the window. Let's look first at the risks and then at some of the responses.

The risks fall in several categories:

1. **As the situation in the Middle East deteriorates, ISIS is already demonstrating that it will respond by encouraging attacks abroad**. In fighting earlier this year in Basilan, a Moroccan was killed alongside members of Abu Sayyaf.[1] A former ISIS fighter interviewed by the New York Times last month in a detention center in Germany said that the ISIS intelligence organisation had sent operatives not only to Europe, but also to Southeast Asia:

> Based on the accounts of operatives arrested so far, the Emni has become the crucial cog in the group's terrorism machinery, and its trainees led the Paris attacks and built the suitcase bombs used in a Brussels airport terminal and subway station. Investigation records show that its foot soldiers have also been sent to Austria, Germany, Spain, Lebanon, Tunisia, Bangladesh, Indonesia and Malaysia.[2]

We could see a more systematic effort to send trained Southeast Asian nationals back to the region, just as operatives were sent back to France and Brussels

2. **Southeast Asian ISIS leaders in Syria and Iraq are trying to fund and direct attacks by cells in the region, and one of these could eventually work**. The not very competent Puchong attack was directed by the Malaysian named Wandy; the even more incompetent men arrested in Batam had no capacity to hit

[1] "Militant Moroccan Bomb Expert Killed in Basilan Clash", philstar.com, 10 April 2016.
[2] "How a Secretive Branch of ISIS Built a Network of Killers," New York Times, 4 August 2016.

Singapore as alleged, but they did get funding and direction from Bahrun Naim, an Indonesian who has tried, so far unsuccessfully, to direct both group and lone wolf attacks in Indonesia, Malaysia and Singapore. We have also had funds from an Indonesian in Syria reach the bank account of a Filipina married to an Indonesian in Mindanao for purchasing arms which were then sent back to Poso, in central Sulawesi.

3. **As more Southeast Asians get killed in Syria and Iraq-- and we hear of deaths now almost daily -- the motivation for retaliation will increase here, with possible new targeting of foreigners.**

4. **Pro-ISIS structures in the region are showing more interest in heeding instructions from ISIS central.** We have more than a dozen groups in Indonesia that have sworn allegiance to al-Baghdadi; moves toward developing a wilayat or province of IS in the Philippines; and cells in Malaysia. It's worth remembering that at the end of May, the spokesman for ISIS called for making Ramadan the "month of calamity for non-believers everywhere"; on 28 June there was the attack on a Malaysian nightclub and on 5 July, a failed suicide attack on a police station in Solo, Central Java. The fact that both were amateurish is important, because capacity is a big determinant of risk and helps in assessing the proportionality of the response, but the intent to kill was clear.

5. **Long dormant networks seem to be re-emerging.** One fascinating example was in the ISIS video that emerged at the end of June showing an Indonesian, a Malaysian and a Filipino all taking part in beheadings but also swearing allegiance to an Abu Sayyaf leader, Isnilon Hapilon, as amir of ISIS for Southeast Asia. The Malaysian, Rafi bin Udin was a member of the old Kumpulan Mujahidin Malaysia (KMM) whose members have not been active in Malaysia since 2001; he was arrested in Indonesia in 2003, held under the ISA and eventually released in 2006. The Indonesian spent nine years in prison in the Philippines together with one of Rafi's former cellmates. The Filipino is an Abu Sayaf member who went to Syria via Japan. Those ties in Syria can lead and have led directly to plots in the region.

6. **More women are taking an active role in ISIS than in many other Islamist networks**. Women are driving families to leave for Syria; playing a role in financial transactions; acting as propagandists; helping finance travel and providing logistic support through networks of migrant domestic workers; and solidifying alliances among jihadi networks through marriage. In one recent example, the daughter of Indonesian ISIS leader Abu Jandal married off his daughter in Syria to a French foreign fighter last April.

All this means that no one should dismiss the threat as false or fabricated; it is real.

That said, *of course* the threat of terrorism is also used for domestic political purposes in a variety of ways and in a variety of settings. It is hard to see how the ISIS cells in Malaysia, warrant both a prevention of terrorism act AND a draconian

national security act. In Indonesia, the threat of ISIS is being used to justify an enhanced role for the military in counter-terrorism that has more to do with rivalry with the police and desire for a greater role in internal security than an actual assessment of risk.

But just because state actors can use the threat of terrorism to enhance their own powers does not mean that all counter-terrorism legislation should be dismissed or that human rights advocates should lobby for such stringent safeguards that the legislation itself becomes useless, which is basically what happened with the 2007 Philippines anti-terrorism law, known as the Human Security Act . As always, there is a balance to be achieved between rights and security, and if Malaysia has gone too far in one direction, the Philippines seems to have decided to ignore its judicial system altogether, relying on vigilante killings to take care of crime.

The trick is to get a law that recognizes the threat but doesn't go overboard; a legal system that is both professional and independent of the executive branch; and a review process that can make corrections as necessary. The International Committee of the Red Cross has recently released a very useful set of guidelines for anti-terrorism legislation and prison-based programs.[3] It notes that "some measures can have perverse consequences not only for the detainees targeted, but for the general detained population and society as a whole." In particular, ill-treatment and highly restrictive regimes that amount to prolonged solitary confinement can have a "highly negative impact", "inducing stress, aggression, violent or anti-social behaviours."[4]

Too harsh a prison regime can further radicalisation, but supervision that is too lax can give free rein to extremists to recruit, disseminate propaganda and even direct operations from prison, as we have seen in Indonesia. The draft anti-terrorism law now under discussion there would drastically increase the number of terrorism suspects in detention, leading to more overcrowding of prisons that in some cases are already 500 per cent or more over capacity. That is a sure recipe for radicalisation and inability to monitor individual cases.

The ICRC does not condemn preventive detention per se but notes that there must be an "individualized and ongoing" assessment of risk and all suspects must have a way to challenge the legality of their detention.

It would be arbitrary to categorize as "radicalized" or at risk of "radicalization" all detainees facing certain charges, professing a certain religion or having a similar history, such as having travelled or planned to travel to certain places of conflict abroad.[5]

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[3] ICRC, "'Prevention of radicalization' and 'de-radicalization' programmes in detention", 10 June 2016.
[4] Ibid.
[5] Ibid.

Authorities have to be very careful with the instruments they use to assess risk, too. A questionnaire developed in a Western country and used in Indonesian prisons ended up creating resentment on the part of both prisoners to whom it was administered, and prison authorities who were supposed to use it, both because some of the assumptions it made, such as that everyone convicted of terrorism had used violence, and because the officials trained to use it were not those who had day-to-day contact with the inmates.

In the end the key is proportionality. The threat of terrorism is too often used as an excuse to round up political opponents. Having checks and balances in the political system and review processes built into any anti-terrorism legislation remains essential.

For those interested in reading the ICRC statement, it can be downloaded at https://www.icrc.org/en/download/file/24640/radicalization_in_detention_-_key_messages.pdf.

International Human Rights Law & National Security

remarks given by Emerlynne Gil during the Civil Society Conference on National Security

Kuala Lumpur, 18 August 2016

It is very difficult for me to be the last speaker in this forum where a lot has already been said about how Malaysia's National Security Council Act 2016 contravenes international human rights law. Hence, what I would like to do now is to emphasize specific points that were brought up earlier, to contribute to giving more clarity on these issues.

I will be focusing on three particular points that have come up during the discussions today:

(a) Does fighting terrorism collide with the interest of promoting and protecting human rights?
(b) What are the dangers of broad and wide-ranging powers and lack of safeguards in national security laws? and
(c) Can international human rights laws still accommodate the type of threats we are facing now?

Following the recent spate of terrorist attacks around Southeast Asia, many ASEAN Member States have made "national security" a priority in their agendas. Many countries are now either amending existing laws or adopting new laws related to countering terrorism and protecting national security.

Malaysia is one of those Southeast Asian countries and it was quick to adopt its National Security Council Act 2016. The bill was hastily tabled at the House of Representatives on 1 December 2015 and was passed on the same day by a vote of 107 in favor and 77 against.

The International Commission of Jurists (ICJ) deplored the manner in which the government appeared to steamroll the bill to passage.[1] The ICJ noted that the same rushed manner was employed in passing the Prevention of Terrorism Act (POTA) and the amendments to the Sedition Act.[2] It appeared that there was a deliberate effort to prevent these pieces of legislation from being scrutinized and discussed publicly.

One of the basic tenets of the rule of law is that the public should have access to drafts of legislation at the earliest stage of their development. In this way, the public would be able to scrutinize the contents of the draft laws, discuss and debate the issues therein, and comment on how these draft laws may further be improved or developed.

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[1] International Commission of Jurists, *Malaysia: the ICJ condemns passage of National Security Council bill, urges reforms in lawmaking*, 3 December 2015, available at http://www.icj.org/malaysia-the-icj-condemns-passage-of-national-security-council-bill-urges-reforms-in-lawmaking/
[2] *Ibid.*

It is indeed unfortunate that the Malaysian public was not given the opportunity to thoroughly examine the National Security Council Act 2016. This law turned out to be a poorly conceived piece of legislation, with very concerning provisions that may have a negative impact on the promotion and protection of human rights in the country.

No colliding interests

Under international law, it is the responsibility of the State to adopt measures to protect people from terrorist acts committed by non-State actors in a manner that is consistent with international law, in particular human rights, refugee, and international humanitarian law.[3] States also have the obligation to prosecute and punish all perpetrators of terrorist acts, in a manner consistent with human rights.[4]

National security is a means to ensure that human rights are protected and the rule of law is upheld. Measures that States take to protect national security must respect the principles of the rule of law, separation of powers, and human rights.

It is clear therefore that the interests of protecting the people from terrorist acts or threats to national security do not collide with the interest of promoting and protecting human rights. The nature of terrorist acts does not permit states to disregard their obligations under international human rights law, including in particular in relation to non-derogable rights.[5]

In the 2009 report of the *Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, the Panel explained that defending human rights in the face of violent terrorism brings to the fore the fundamental notion of human dignity. Defending each and every person's inherent rights would defeat the notion of instrumentalizing human beings, avoiding "the terrorist trap in which violent actions and reactions come to be seen as necessary or justifiable."[6]

Protecting human rights may also address genuine injustices and long-held grievances. Grievances may be caused by past conflicts or may also emerge from the measures imposed by the government to counter-terrorism. As observed by the Panel in the abovementioned report, there are instances where terrorists exploit these grievances for their own ends. If the State shows concretely its commitment to respect and protect human rights while countering terrorism,

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[3] UN Security Council Resolution 2178, UN Doc. S/RES/2178 (24 September 2014), preambular paragraph 7.
[4] International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration: Counter-Terrorism, Human Rights, and the Rule of Law*, Human Rights and the Rule of law Series No. 1, Geneva, 2008, at page 5.
[5] *Supra* note 4 at page 6.
[6] International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights*, Geneva (2009) at page 21.

this could end these grievances or at the very least, "secure greater legitimacy for its counter-terrorism efforts."[7]

Broad & wide-ranging powers and the lack of safeguards

In its statement following the passage of the National Security Council Act 2016, the ICJ expressed serious concerns over the overbroad powers granted to the Prime Minister and the security forces, noting that this is inconsistent with the rule of law and could lead to serious human rights violations.[8]

Overbroad language in national security laws opens the door to wide discretionary powers and broad operational security activities without clear legal limits on implementation. Laws that have such broad language can result in imposing undue restrictions on the right to freedom of information, freedom of expression, and freedom of assembly and association.

These concerns over the overbroad language in the law are aggravated by the lack of clear safeguards over the implementation of the law. The law provides immunity from any legal proceedings or members of the National Security Council, the Director of Operations, the security team, and other government staff involved in the administration of the "security area" for carrying out their duties and functions under the law.

The UN Special Rapporteur on human rights and counter-terrorism has emphasized that there should be oversight institutions that can oversee all aspects of work, including compliance with the law, effectiveness and efficacy of intelligence activities, the state of finances, and administrative practices.[9] It has been established as a good practice for a State to have a multi-level system oversight mechanism that includes a "combination of internal, executive, parliamentary, judicial, and specialized institutions."[10] The mandates and powers of the oversight of each of these bodies should be set out clearly in publicly available laws.

Can international human rights law still accommodate the type of threats we are facing now?

This question kept on coming up throughout the day. There seems to be a sense that the types of threats we are facing now are unprecedented and greater than what previous generations have faced before.

Again, I would like to refer everyone to the report of the *Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, which I have mentioned earlier.

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[7] *Ibid.* at page 22.
[8] *Supra* note 1.
[9] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Compilation of good practices on legal and institutional frameworks and measures that ensure for human rights by intelligence agencies while countering terrorism, including on their oversight, UN Doc. A/HRC/14/46 (2010), Principle 6.
[10] *Ibid* at para. 8

In that report, the Panel emphasizes that human rights and humanitarian law were not conceived and drafted with peace and stability in mind. We have to remember that the men and women who drafted the first human rights instruments we have now had just emerged from "the darkest chapter of the twentieth century".[11]

Those men and women had just survived a world war, where millions died and there was great devastation globally. They, therefore, approached the building of the international human rights law framework with a pragmatic view. Hence, the very reason for these human rights instruments was to provide the entire world with a framework that would allow humanity "to respond effectively to the most serious of crises."[12]

International human rights law recognizes that there are a few rights that are absolute, and that even outside emergency situations, there may be rights that can be lawfully limited (e.g. freedom of movement, of expression, etc.). The criteria of how these rights may be limited and the extent of the limitations are clearly laid out in international law.[13] Moreover, the human rights framework recognizes that there may be situations of emergency and that States "must have the necessary freedom to maneuver so that, in the face of extreme danger, they can act promptly and effectively in the best interests of society as a whole." International human rights law foresees situations where there may be some rights "formally suspended in times of a legitimate emergency."[14]

It is therefore erroneous to assert that international human rights law are no longer relevant considering the threats we face in our society now. International human rights law was drafted precisely with these threats and dangers in mind. They were crafted as a solid guarantee that even in the most difficult of times and the most serious of crises, States should still be able to respond while respecting and protecting each and every person's human rights.

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[11] *Supra* note 6 at page 18.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.

LAWS OF MALAYSIA

Act 776

NATIONAL SECURITY COUNCIL ACT 2016

Date of Royal Assent ... ... 18 February 2016 (pursuant to Clause (4A) of Article 66 of the Federal Constitution)

Date of publication in the *Gazette* ... ... 7 June 2016

LAWS OF MALAYSIA

Act 776

NATIONAL SECURITY COUNCIL ACT 2016

ARRANGEMENT OF SECTIONS

PART IV

DECLARATION OF SECURITY AREA

PART V

SPECIAL POWERS OF THE DIRECTOR OF OPERATIONS AND SECURITY FORCES DEPLOYED TO THE SECURITY AREA

PART VI

GENERAL

PART VII

SAVINGS

Section

LAWS OF MALAYSIA

Act 776

NATIONAL SECURITY COUNCIL ACT 2016

An Act to provide for the establishment of the National Security Council, the declaration of security areas, the special powers of the Security Forces in the security areas and other related matters.

[ ]

ENACTED by the Parliament of Malaysia as follows:

PART I

PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the National Security Council Act 2016.

(2) This Act comes into operation on a date to be appointed by the Prime Minister by notification in the *Gazette*.

Interpretation

2. In this Act, unless the context otherwise requires—

"armed forces" has the meaning assigned to it in the Armed Forces Act 1972 [*Act 77*];

"dangerous things" includes firearms, ammunition, explosive substances, weapons or any other thing that is reasonably likely to be used to cause serious damage to property, or death or serious injury to a person;

"Government Entities" includes—

(a) any ministry, department, office, agency, authority, commission, committee, board or council of the Federal Government, or of any of the State Governments, established under any written law or otherwise;

(b) any local authorities; and

(c) the Security Forces;

"security area" means any area declared by the Prime Minister under section 18;

"Director General" means the Director General of National Security appointed under section 15;

"Council" means the National Security Council established under section 3;

"Security Forces" means—

(a) the Royal Malaysia Police, the Royal Malaysia Police Volunteer Reserve and the Auxiliary Police referred to in the Police Act 1967 [*Act 344*];

(b) the armed forces;

(c) any force which is a visiting force for the purposes of Part I of the Visiting Forces Act 1960 [*Act 432*]; or

(d) the Malaysian Maritime Enforcement Agency established under the Malaysian Maritime Enforcement Agency Act 2004 [*Act 633*];

"Director of Operations" means any person appointed by the Council under section 20;

"Chairman" means the Chairman of the Council referred to in section 6;

"declaration" means the declaration of a security area made under section 18.

PART II

NATIONAL SECURITY COUNCIL

Establishment of the National Security Council

3. (1) A council by the name of the "National Security Council" is established.

(2) The Council shall be the Government's central authority for considering matters concerning national security.

Functions of the Council

4. The Council shall have the following functions:

(a) to formulate policies and strategic measures on national security, including sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security;

(b) to monitor the implementation of the policies and strategic measures on national security;

(c) to advise on the declaration of security areas; and

(d) to perform any other functions relating to national security for the proper implementation of this Act.

Powers of the Council

5. Notwithstanding any other written law, the Council shall have the power to do all things necessary or expedient for or in connection with the performance of its functions including—

(a) to control and coordinate Government Entities on operations concerning national security; and

(b) to issue directives to any Government Entity on matters concerning national security.

Membership of the Council

6. The Council shall consist of the following members:

(a) the Prime Minister as Chairman;

(b) the Deputy Prime Minister as Deputy Chairman;

(c) the Minister charged with the responsibility for defence;

(d) the Minister charged with the responsibility for home affairs;

(e) the Minister charged with the responsibility for communication and multimedia;

(f) the Chief Secretary to the Government;

(g) the Chief of Defence Forces; and

(h) the Inspector General of Police.

Meetings

7. (1) The Council shall convene its meetings as often as may be necessary but which shall not be less than once in every three months.

(2) The meetings shall be held at the time and place as determined by the Chairman.

Procedure at meetings

8. (1) The Chairman shall preside at all meetings of the Council.

(2) If the Chairman is absent from any meeting of the Council, he may appoint the Deputy Chairman or, in the absence of the Deputy Chairman, a member of the Council, to replace him as the chairman of the meeting.

(3) The quorum of the Council shall be five.

Temporary exercise of functions of Chairman

9. (1) The Deputy Chairman shall act as the Chairman for the period when—

(a) the office of the Chairman is vacant;

(b) the Chairman is absent from duty or from Malaysia; or

(c) the Chairman is, for any other reason, unable to carry out his functions.

(2) The Deputy Chairman shall, during the period in which he is carrying out the functions of the Chairman under this section, be deemed to be the Chairman.

Council may invite others to meetings

10. The Council may invite any person not being a member of the Council to attend its meetings to advise the Council on any matter under discussion.

Procedures

11. Subject to this Act, the Council may determine its own procedure.

Council may establish committees

12. (1) The Council may establish any committee as it considers necessary or expedient to assist it in the performance of its functions.

(2) The Council may appoint any person to be a member of any committee established under subsection (1).

(3) The Council may appoint any of its members or any other person to be the chairman of the committee established under subsection (1).

(4) The committee shall be subject to and act in accordance with any direction given by the Council.

(5) The committee shall meet as often as may be necessary at the time and place as the chairman of the committee may determine.

(6) The committee may regulate its own procedure.

(7) The committee may invite any other person to attend any meeting of the committee for the purpose of advising the committee on any matter under discussion.

Secretary to the Council

13. (1) The Director General shall be the Secretary to the Council.

(2) The Secretary shall be responsible—

(a) for the overall administration and management of the functions and the day-to-day affairs of the Council; and

(b) for the carrying out of any other duties as directed by the Council.

(3) The Secretary shall, in carrying out his responsibilities, act under the direction of the Council.

Fund

14. The Government shall provide sufficient funds for the Council annually to enable the Council to perform its functions under this Act.

PART III

DUTIES OF THE DIRECTOR GENERAL OF NATIONAL SECURITY AND GOVERNMENT ENTITIES

Appointment of the Director General of National Security and officers

15. (1) The Prime Minister shall, upon the recommendation of the Chief Secretary to the Government, appoint a person from amongst the public officers to be the Director General of National Security.

(2) There shall be appointed Deputies Director General of National Security and such number of other officers and servants from amongst the public officers as is considered necessary or expedient for the purposes of carrying out and giving effect to the provisions of this Act.

(3) The Director General shall be responsible to the Council in the performance of his duties under this Act.

(4) The Deputies Director General and such other officers and servants referred to in subsection (2) shall be subject to the general direction and supervision of the Director General.

Duties and powers of the Director General

16. (1) The Director General shall have such duties and powers as may be imposed or conferred upon him by the Council.

(2) Without prejudice to the generality of subsection (1), the Director General shall have the following duties:

(a) to implement the policies and strategic measures on national security formulated by the Council;

(b) to coordinate and monitor the implementation of the policies and strategic measures on national security by the Government Entities;

(c) to advise and make recommendations to the Council on strategic measures concerning national security;

(d) to collect, evaluate, correlate and coordinate the information and intelligence from all Government Entities, and to disseminate the information and intelligence to the Government Entities as may be essential in the interest of national security;

(e) to supervise and monitor the implementation of the declaration of a security area and any executive order issued;

(f) to issue directives to the Government Entities on national security measures; and

(g) to perform such other duties as directed by the Council.

(3) Notwithstanding subsection (2), the supervisory and monitoring functions conferred on the Director General shall not extend to the operational control of the Security Forces.

Duties of Government Entities in relation to information or intelligence

17. (1) In the interest of national security, the Government Entities shall immediately report to the Council through the Director General any information or intelligence that affects or is likely to affect national security together with the assessment of the credibility of such information or intelligence.

(2) Upon direction by the Council, any Government Entity or any person shall immediately make available any information or intelligence in its or his possession which relates to national security to the Council through the Director General.

(3) For the purposes of this section, the Council may issue a directive to facilitate the sharing of information and intelligence between the Government Entities.

PART IV

DECLARATION OF SECURITY AREA

Declaration of security area

18. (1) Where the Council advises the Prime Minister that the security in any area in Malaysia is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia, and requires immediate national response, the Prime Minister may, if he considers it to be necessary in the interest of national security, declare in writing the area as a security area.

(2) A declaration made under subsection (1) shall—

(a) apply only to such security area as specified in the declaration; and

(b) cease to have effect upon the expiration of the period specified in subsection (3) or upon the expiration of the period of renewal specified in subsection (4), or in accordance with subsection (6).

(3) A declaration made under subsection (1) shall, but without prejudice to anything previously done by virtue of the declaration, cease to have effect upon the expiration of six months from the date it comes into force.

(4) Notwithstanding subsection (3), a declaration in force may be renewed by the Prime Minister from time to time for such period, not exceeding six months at a time, as may be specified in the declaration.

(5) A declaration made under subsection (1) and a renewal of declaration made under subsection (4) shall be published in such manner as the Prime Minister thinks necessary for bringing it to the notice of the public.

(6) A declaration made under subsection (1) and the renewal of declaration made under subsection (4) shall be published in the *Gazette* and laid before Parliament as soon as possible after it has been made, and if resolutions are passed by both Houses of

Parliament annulling the declaration, it shall cease to have effect, notwithstanding subsections (3) and (4), but without prejudice to anything previously done by virtue of the declaration.

(7) Notwithstanding anything in subsection (2), (3), (4) or (6), the Prime Minister may, at any time, revoke the declaration.

Executive order of the Council

19. (1) Upon a declaration being made under section 18, the Council may issue an executive order to the Director of Operations or such Government Entities as the Council deems necessary in relation to the security area in the interest of national security.

(2) The executive order issued by the Council may include the deployment of any Security Forces or any other relevant Government Entities to the security area.

(3) The Council may amend, replace or revoke the executive order issued under subsection (1).

(4) The executive order shall remain in force until it is revoked by the Council but notwithstanding this it shall cease to have effect if the declaration made under section 18 ceases to have effect or is revoked.

Director of Operations

20. (1) The Council shall appoint a Director of Operations to be the person in charge of the operations in a security area.

(2) The Director of Operations shall be responsible to the Council.

Duties and powers of Director of Operations

21. (1) The Director of Operations shall have the following duties:

(a) to prepare strategic plans for the deployment of the Security Forces to the security area and to provide strategic direction to such Security Forces;

(b) to establish unified commands of the Security Forces in the security area;

(c) to supervise, control and co-ordinate the deployment of the Security Forces to the security area; and

(d) to perform such other functions as directed by the Council.

(2) The Director of Operations shall have the power to do all things necessary or expedient for or in connection with the performance of his duties in the security area.

(3) In the interest of national security, the Director of Operations may in relation to a security area—

(a) establish a committee as he considers necessary or expedient to assist him in carrying out his duties; and

(b) issue a directive to any Government Entity deployed to the security area.

(4) The committee established under paragraph (3)*(a)* shall be responsible to the Director of Operations.

(5) The Government Entities which have been issued with the directive referred to in paragraph (3)*(b)* shall comply with the directive.

PART V

SPECIAL POWERS OF THE DIRECTOR OF OPERATIONS AND SECURITY FORCES DEPLOYED TO THE SECURITY AREA

Exclusion and evacuation of persons

22. (1) The Director of Operations may, by order in writing, exclude any person from the security area or any part of the security area for a period as specified in the order.

(2) The Director of Operations may, by order in writing, evacuate any person or group of persons from the security area or any part of the security area, and resettle such person or group of persons to an area as determined by the Director of Operations.

(3) Any person who fails to comply with the order under subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

Curfew

23. (1) The Director of Operations may, in writing, order all persons in the security area or any part of the security area to remain indoors between such hours as may be specified in the order unless he is in possession of a written permit in that behalf issued by the Director of Operations.

(2) No order under this section shall apply to—

(a) the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri;

(b) any member of the Security Forces or personnel of other Government Entities when acting in the course of his duty in the security area; or

(c) any person or class of persons exempted from the order by the Director of Operations.

(3) Any person who fails to comply with the order under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

Power to control movement, road, *etc.*

24. (1) The Director of Operations may direct any member of the Security Forces in the security area—

(a) to control the movement of any person or any vehicle, vessel, aircraft or conveyance in and out of the security area, including to direct to leave the security area and to refuse entry into the security area;

(b) to control or prohibit the use of any road or water-way in, or air space above, any security area by any person or any vehicle, vessel, aircraft or conveyance; or

(c) to close any road or water-way in the security area.

(2) If a member of the Security Forces in the security area believes on reasonable grounds that a dangerous thing is in or on any vehicle, vessel, aircraft or conveyance in the security area, the member of the Security Forces may do anything necessary to stop the vehicle, vessel, aircraft or conveyance including erecting barriers or other structures.

(3) If the member of the Security Forces stops the vehicle, vessel, aircraft or conveyance, the member of the Security Forces shall not detain it for longer than is reasonable and necessary to search it and anything found in or on it.

Power of arrest

25. Any member of the Security Forces may, without warrant, arrest any person found committing, alleged to have committed or reasonably suspected of having committed any offence under any written laws in the security area.

Power to search and seize

26. (1) Any member of the Security Forces may, without warrant and with or without assistance, stop and search any individual, vehicle, vessel, aircraft or conveyance in the security area if he suspects that any article or thing being evidence of the commission of an offence against any written law is likely to be found on the individual or in the vehicle, vessel, aircraft or conveyance, and may seize any article or thing so found.

(2) Any member of the Security Forces may, without warrant, enter and search any premises or place if he suspects that any article or thing being evidence of the commission of an offence against any written law is likely to be found on the premises or place, and may seize any article or thing so found.

Power to search premises for dangerous things

27. (1) If any member of the Security Forces believes on reasonable grounds that—

(a) there is a dangerous thing on any premises in the security area; and

(b) it is necessary as a matter of urgency to make the dangerous thing safe or to prevent it from being used,

the member of the Security Forces may—

(A) enter into and search the premises;

(B) seize anything found on the premises in the course of the search that the member of the Security Forces believes on reasonable grounds to be a dangerous thing; and

(C) search any person who is at or near the premises where the search is being carried out and seize any dangerous thing found on the person whom the search member believes on reasonable grounds to have any dangerous thing in his possession.

(2) If any member of the Security Forces seizes a dangerous thing—

(a) the member of the Security Forces may take such action as is reasonable and necessary to make the dangerous thing safe or to prevent it from being used; and

(b) the member of the Security Forces shall prepare a list of the dangerous things seized and sign the list, and shall as soon as practicable serve a copy of the list of the dangerous things seized to the occupier of the premises which have been searched, or to his agent or servant at the premises.

(3) If the member of the Security Forces believes on reasonable grounds that the dangerous thing has been used or otherwise involved in the commission of an offence against any written law, the member of the Security Forces shall, as soon as practicable, hand over the dangerous thing to the officer-in-charge of the nearest police station.

(4) If the member of the Security Forces believes on reasonable grounds that the dangerous thing has not been used or otherwise involved in the commission of an offence against any written law, the member of the Security Forces shall, if it is practicable to do so, return the dangerous thing to the the occupier of the premises which have been searched, or to his agent or servant at the premises.

(5) If the member of the Security Forces seizes a dangerous thing from a person and believes on reasonable grounds that the person used the thing in the commission of an offence against any written law, the member of the Security Forces may detain the person for the purpose of placing him in the custody of a police officer at the earliest practicable time.

Power to search persons for dangerous things

28. If any member of the Security Forces in the security area believes on reasonable grounds that a person in the area has a dangerous thing in the person's possession, the member of the Security Forces may—

(a) search the person for such dangerous thing; and

(b) seize such dangerous thing found in the search.

Power to seize vehicle, vessel, aircraft or conveyance

29. Any member of the Security Forces may seize any vehicle, vessel, aircraft or conveyance in the security area if he suspects that the vehicle, vessel, aircraft or conveyance is likely to be connected with the commission of an offence under any written laws.

Power to take temporary possession of land, building or movable property

30. (1) The Director of Operations or any person authorized by the Director of Operations may, if it appears to him to be necessary or expedient to do so in the interest of national security, or for the accommodation of any Security Forces, take temporary

possession of any land, any building or part of a building, or any movable property in any security area and may give such directions as appear to him necessary or expedient in connection with the taking of possession of that land, building or movable property.

(2) Any member of the Security Forces may take such steps and use such force as appears to him to be reasonably necessary for securing compliance with directions given to any person under subsection (1).

(3) While any land, building or movable property is in temporary possession of the Director of Operations or any person authorized by the Director of Operations under this section, the land, building or movable property may, notwithstanding any restriction imposed on the use thereof (whether by any written law or other instrument or otherwise), be used by, or under the authority of, the Director of Operations or any person authorized by the Director of Operations for such purpose, and in such manner, as the Director of Operations or any person authorized by the Director of Operations thinks expedient in the interest of national security or for the accommodation of any Security Forces.

(4) The Director of Operations or any person authorized by the Director of Operations, so far as appears to him to be necessary or expedient in connection with the taking of temporary possession or use of the land, building or movable property in pursuance of subsection (3)—

(a) may do, or authorize persons using the land, building or movable property to do, in relation to the land, building or movable property, anything any person having an interest in the land, building or movable property would be entitled to do by virtue of that interest; and

(b) may by order provide for prohibiting or restricting the exercise of rights of way over the land or building, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in the land or building or otherwise.

(5) The owner or occupier of any land, building or movable property shall, if requested by or on behalf of the Director of Operations or any person authorized by the Director of Operations so to do, furnish to such authority or person as may be specified in the request such information in his possession relating to the land, building or movable property, being information which may reasonably be demanded of him in connection with the execution of this section, as may be so specified.

(6) Any person aggrieved by reason of the taking possession of any land, building or movable property under this section may, within fourteen days after possession has been taken, give notice of his objection thereto to an advisory committee appointed under subsection (7).

(7) The advisory committee referred to in subsection (6) shall consist of the persons appointed by the Director General and such committee may make rules for the conduct of its proceedings.

(8) The chairman of an advisory committee to which such notice has been given under subsection (6) by an aggrieved person shall inform the Director of Operations or any person authorized by the Director of Operations who has taken possession of the land, building or movable property.

(9) The advisory committee shall consider the objection made by the aggrieved person under subsection (6) and any grounds which may be put forward against the objection by the Director of Operations or any person authorized by the Director of Operations who has taken possession of the land, building or movable property and shall forward its recommendations to the Director General.

(10) The Director General shall, after considering the recommendations of the advisory committee, give such directions as he thinks fit.

(11) If possession is taken of any land, building or movable property in any security area under subsection (1) or the Director General gives direction under subsection (10) to the Director of Operations or any person authorized by the Director of Operations to take temporary possession of any land, building or movable property in the security area, compensation shall be paid to the aggrieved person.

Demand for use of resources

31. (1) If it appears to the Director of Operations or any person authorized by the Director of Operations that any resources is required in preserving national security in the security area, the Director of Operations or any person authorized by the Director of Operations may demand that such resources be utilized for such purpose.

(2) Compensation shall be paid to the person whose resources are demanded under this section.

(3) For the purposes of this section, "resources" includes utilities and assets.

Compensation

32. If possession is taken of any land, building or movable property under section 30, or resources are demanded to be utilized under section 31, compensation in respect of the possession or utilization shall be as assessed by the Director General.

Power to order destruction of certain unoccupied buildings

33. (1) If in any security area any building or structure is left unoccupied by reason of the operation of any order made under this Part, the Director of Operations or any person authorized by the Director of Operations may if it appears to him—

(a) to be likely that the building or structure will, if left standing, be used by persons who intend, or are about, to act or have recently acted in a manner prejudicial to national security or by any other person who is likely to harbour any such person; and

(b) to be impracticable in any other way to prevent such use,

destroy or authorize the destruction of that building or structure.

(2) Compensation shall be paid to any aggrieved person in respect of the destruction of any building or structure under this section if the aggrieved person satisfies the Director General that—

(a) the building or structure was erected by or with the consent of the person lawfully entitled to the land on which the building or structure was erected; and

(b) the building or structure was not liable to forfeiture under any written law.

(3) Compensation may be paid to the aggrieved person in relation to any building or structure erected by or with the consent of the person lawfully entitled to the land on which it was erected, notwithstanding that the building or structure is liable to forfeiture under any written law, if the aggrieved person satisfies the Director General that the building or structure was used by persons who intend, or are about, to act or have recently acted, in a manner prejudicial to national security or that those persons were being or had been harboured by his servant or agent, as the case may be, without his knowledge or consent, and that he exercised all due diligence to prevent the building or structure being so used or the harbouring of those persons, as the case may be.

(4) Any compensation payable under this section shall be as assessed by the Director General.

Use of reasonable and necessary force

34. (1) Any member of the Security Forces in a security area may use such force against persons and things as is reasonable and necessary in the circumstances to preserve national security.

(2) The use of such force against a person shall not—

(a) include anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member of the Security Forces believes on reasonable grounds that doing such action is deemed necessary—

(i) to protect the life of, or to prevent serious injury to, another person, including the member; or

(ii) to protect the security area or any part of the security area against a threat of armed attack; or

(b) subject the person to greater indignity than is reasonable and necessary in the circumstances.

Power to dispense with inquests, *etc.*

35. Notwithstanding anything to the contrary in any written law, in the security area—

(a) a Magistrate or a coroner may dispense with the holding of a death inquiry or inquest on the dead body of any member of the Security Forces on duty; and

(b) where the Magistrate or coroner responsible for holding a death inquiry or inquest upon the body of any person is satisfied that the person has been killed in the security area as a result of operations undertaken by the Security Forces for the purpose of enforcing any written laws, the Magistrate or coroner, as the case may be, may dispense with the holding of a death inquiry or inquest on the body of the person.

Arrested persons and things seized to be handed over to police

36. Any person arrested and taken into custody under this Act and any things seized shall be handed over to the officer-in-charge of the nearest police station without unnecessary delay, together with a report of the circumstances occasioning the arrest or seizure.

PART VI

GENERAL

Obligations of secrecy

37. (1) Except for any of the purposes of this Act or for the purposes of any civil or criminal proceedings under any written law or where otherwise authorized by the Council—

(a) no member of the Council or committee or any person attending any meeting of the Council or committee, whether during or after his tenure of office or employment, shall disclose any information obtained by him in the course of his duties; and

(b) no other person who has by any means access to any information or document relating to the affairs of the Council shall disclose such information or document.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one hundred thousand ringgit or to both.

Protection against suits and legal proceedings

38. No action, suit, prosecution or any other proceeding shall lie or be brought, instituted or maintained in any court against the Council, any committee, any member of the Council or committee, the Director of Operations, or any member of the Security Forces or personnel of other Government Entities in respect of any act, neglect or default done or omitted by it or him in good faith, in such capacity.

Public servant

39. Every member of the Council or committee, the Director of Operations, or every member of the Security Forces or personnel of other Government Entities while discharging his duty or performing his functions under this Act in such capacity shall be deemed to be a public servant within the meaning of the Penal Code [*Act 574*].

Public Authorities Protection Act 1948

40. The Public Authorities Protection Act 1948 [*Act 198*] shall apply to any action, suit, prosecution or proceedings against the Council, any committee, any member of the Council or committee, the Director of Operations, or any member of the Security Forces or personnel of other Government Entities in respect of any act or thing done or committed by it or him in such capacity.

Prosecution

41. No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the Public Prosecutor.

Regulations

42. (1) The Prime Minister may make regulations for the purposes of carrying out or giving effect to the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Prime Minister may make regulations—

(a) to control the movement of persons, vehicles, vessels, aircrafts and conveyance in any security area;

(b) to prescribe any prohibited action and activities during the period of the declaration made under section 18;

(c) to prescribe the procedures for the taking possession of land, buildings and other movable property, and the procedures for demand for use of resources in any security area; and

(d) to prescribe the procedures for the destruction of buildings and other structures in any security area.

(3) The regulations made under this Act may provide for any act or omission in contravention of the regulations to be an offence and may provide for penalties of a fine not exceeding one hundred thousand ringgit or imprisonment for a term not exceeding five years or both.

PART VII

SAVINGS

Existing National Security Council

43. (1) Any act done or action taken prior to the commencement of this Act by the existing National Security Council established by the Federal Government shall be deemed to have been done or taken under this Act and may accordingly be continued by the Council.

(2) Any directive, order or decision made by the existing National Security Council and in force immediately before the commencement of this Act shall, upon the commencement of this Act, so far as it is not inconsistent with this Act continue to remain in force until it is revoked by the Council.

Existing committees

44. All committees established under the existing National Security Council and in force immediately before the commencement of this Act shall, upon the commencement of this Act, continue to remain in force until dissolved by the Council.

DICETAK OLEH
PERCETAKAN NASIONAL MALAYSIA BERHAD,
KUALA LUMPUR
BAGI PIHAK DAN DENGAN PERINTAH KERAJAAN MALAYSIA